

# National Taxpayer Advocate **2023 PURPLE BOOK**

Compilation of Legislative Recommendations  
to Strengthen Taxpayer Rights and  
Improve Tax Administration

**December 31, 2022**

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# NATIONAL TAXPAYER ADVOCATE 2023 PURPLE BOOK: COMPILATION OF LEGISLATIVE RECOMMENDATIONS TO STRENGTHEN TAXPAYER RIGHTS AND IMPROVE TAX ADMINISTRATION

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## INTRODUCTION

Section 7803(c)(2)(B)(ii)(IX) of the IRC requires the National Taxpayer Advocate, as part of the Annual Report to Congress, to propose legislative recommendations to resolve problems encountered by taxpayers. This year, we present 65 legislative recommendations.

We have taken the following steps to make these recommendations as accessible and user-friendly as possible for Members of Congress and their staffs:

- We have consolidated our recommendations from various sections of this year's report, prior reports, and other sources into this single volume.
- We have grouped our recommendations into categories that generally reflect the various stages in the tax administration process so that, for example, return filing issues are presented separately from audit and collection issues.
- We have presented each legislative recommendation in a format like the one used for congressional committee reports, with "Present Law," "Reasons for Change," and "Recommendation(s)" sections.
- This year, for the first time, we have added a summary section at the beginning of each legislative recommendation. It describes the "Problem" and our suggested "Solution" in layman's terms. Our objective is to allow readers to quickly get a feel for all 65 of our recommendations by scanning the summaries.
- Where bills have been introduced in the past that are generally consistent with one of our recommendations, we have included a footnote at the end of the recommendation that identifies one or more of those bills. (Because of the large number of bills introduced in each Congress, we may have overlooked some. We apologize for any bills we have inadvertently omitted.)
- We have compiled a table, which appears at the end of this volume as Appendix 1, that identifies additional materials relating to our recommendations, where such materials exist. In addition to identifying a larger number of prior bills than we cite in our footnotes, the table provides references to more detailed issue discussions that have been published in prior National Taxpayer Advocate reports.

By our count, Congress has enacted approximately 50 legislative recommendations that the National Taxpayer Advocate has proposed. See Appendix 2 for a complete listing. This total includes approximately 23 provisions that were included as part of the Taxpayer First Act.<sup>1</sup>

The Office of the Taxpayer Advocate is a non-partisan, independent organization within the IRS that advocates for the interests of taxpayers. We have dubbed this the "Purple Book" because the color purple, as a mix of red and blue, has come to symbolize bipartisanship. Historically, tax administration legislation has attracted bipartisan support. For example, the Taxpayer First Act was approved by both the House and the Senate in 2019 on voice votes with no recorded opposition.

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<sup>1</sup> Taxpayer First Act, Pub. L. No. 116-25, 133 Stat. 981 (2019). We say Congress enacted "approximately" a certain number of National Taxpayer Advocate recommendations because in some cases, enacted provisions are substantially similar to what we recommended but are not identical. The statement that Congress enacted a National Taxpayer Advocate recommendation is not intended to imply that Congress acted solely because of the recommendation. Congress, of course, receives suggestions from a wide variety of stakeholders on an ongoing basis and makes decisions based on the totality of the input it receives.

We believe most recommendations presented in this volume are non-controversial, common sense reforms that will strengthen taxpayer rights and improve tax administration. We hope the tax-writing committees, other Members of Congress, and their staffs find it useful, and we would be happy to discuss these recommendations in more detail with interested committees or Member offices.

We highlight the following ten legislative recommendations for particular attention:

- **Amend the “Lookback Period” to Allow Tax Refunds for Certain Taxpayers Who Took Advantage of the Postponed Filing Deadlines Due to COVID-19.** Because of the pandemic, the IRS postponed the tax return filing deadline to July 15 in 2020 and to May 17 in 2021. These postponements helped taxpayers by giving them more time to file their returns, but they are inadvertently springing a trap on unwary taxpayers and tax professionals that may cause permanent harm by limiting their ability to obtain refunds. Under IRC § 6511, taxpayers generally must meet a two-part test to receive a refund. First, the claim for refund must be timely; it generally must be filed by the later of three years from the date the return was filed or two years from the date the tax was paid. Second, the monies at issue must have been paid within a specified “lookback period.” The lookback period is three years plus the period of any extension of time for filing if the taxpayer filed the claim for refund within three years from the date of filing the return. But a “postponement” of the filing deadline, unlike an “extension” of time to file, does not extend the lookback period. *A taxpayer who filed his or her original return under to a “postponement” granted by the IRS because of the federally declared disaster will not be entitled to a refund if the excess amounts were paid (or deemed paid) outside the lookback period.*

To illustrate, a taxpayer who filed her 2019 return by the postponed filing deadline of July 15, 2020, might reasonably believe she has until July 15, 2023, to file her claim for refund (three years from the date she filed her return).<sup>2</sup> However, her taxes (withholding and estimated tax payments) were deemed paid on April 15, 2020, which falls outside the lookback period of three years from July 15, 2023. The IRS will deny a claim for refund filed after April 15, 2023, in this circumstance. We recommend Congress amend the lookback period so that when the IRS postpones a filing deadline due to a disaster declaration, taxpayers can recover amounts paid within three years *plus the period of the postponement, similar to the law for extensions to file.*

- **Authorize the IRS to Establish Minimum Competency Standards for Federal Tax Return Preparers.** The IRS receives over 160 million individual income tax returns each year, and paid tax return preparers prepare the majority of them. Both taxpayers and the tax system depend heavily on the ability of preparers to prepare accurate tax returns. Yet no one is required to pass a competency test to become a federal tax return preparer, and numerous studies have found that non-credentialed tax return preparers routinely prepare inaccurate returns, which harms taxpayers and tax administration. To protect the public, federal and state laws generally require lawyers, doctors, securities dealers, financial planners, actuaries, appraisers, contractors, motor vehicle operators, and even barbers and beauticians to obtain licenses or certifications and, in most cases, to pass competency tests. Taxpayers and the tax system would benefit from requiring federal tax return preparers to do so as well. The IRS sought to implement minimum standards beginning in 2011, including passing a basic competency test, but a U.S. Court of Appeals affirmed a U.S. district court opinion that the IRS lacked the authority to impose preparer standards without statutory authorization. The plan the IRS rolled out in 2011 was developed after extensive consultation with stakeholders and was supported by almost all

<sup>2</sup> This year, a taxpayer has until July 17, 2023, to file a timely claim for refund, as July 15, 2023, is a Saturday. When the due date falls on a Saturday, Sunday, or legal holiday, IRC § 7503 provides that a taxpayer has until the next business day to file a timely claim.



such stakeholders. We recommend Congress authorize the IRS to reinstitute minimum competency standards.

- **Expand the Tax Court’s Jurisdiction to Hear Refund Cases and Assessable Penalties.** Under current law, taxpayers who owe tax and wish to litigate a dispute with the IRS must go to the U.S. Tax Court, while taxpayers who have paid their tax and are seeking a refund must sue in a U.S. district court or the U.S. Court of Federal Claims. Although this dichotomy between deficiency cases and refund cases has existed for decades, we recommend Congress give taxpayers the option to litigate both deficiency and refund tax disputes in the U.S. Tax Court. Due to the tax expertise of its judges, the Tax Court is often better equipped to consider tax controversies than other courts. It is also more accessible to unsophisticated and unrepresented taxpayers than other courts because it uses informal procedures, particularly in disputes that do not exceed \$50,000 for one tax year or period.
- **Restructure the Earned Income Tax Credit (EITC) to Make It Simpler for Taxpayers and Reduce the Improper Payments Rate.** TAS has long advocated for dividing the EITC into two credits: (i) a refundable worker credit based on each individual worker’s earned income, despite the presence of a qualifying child, and (ii) a refundable child credit that would reflect the costs of caring for one or more children. For wage earners, claims for the worker credit could be verified with nearly 100 percent accuracy by matching claims on tax returns against Forms W-2, reducing the improper payment rate on those claims to nearly zero. The portion of the EITC that varies based on family size would be combined with the child tax credit into a larger family credit. The National Taxpayer Advocate published a report making this recommendation in 2019,<sup>3</sup> and we continue to advocate for it.<sup>4</sup>
- **Expand the Protection of Taxpayer Rights by Strengthening the Low Income Taxpayer Clinic (LITC) Program.** The LITC Program is an effective means to assist low-income taxpayers and taxpayers who speak English as a second language. When the LITC Program was established as part of the IRS Restructuring and Reform Act of 1998, IRC § 7526 limited annual grants to no more than \$100,000 per clinic. The law also imposed a 100 percent “match” requirement so a clinic cannot receive more in grants than it raises from other sources. The nature and scope of the LITC Program has evolved considerably since 1998, and those requirements are preventing the program from expanding assistance to the largest possible universe of eligible taxpayers. We recommend that Congress remove the per-clinic cap and allow the IRS to reduce the match requirement to 25 percent if doing so would provide coverage for additional taxpayers.
- **Modify the Requirement That Written Receipts Acknowledging Charitable Contributions Must Pre-Date the Filing of a Tax Return.** To claim a charitable contribution, a taxpayer must receive a written acknowledgment from the donee organization before filing his or her tax return. For example, if a taxpayer contributes \$5,000 to a church, synagogue, or mosque; files a tax return claiming the deduction on February 1; and receives a written acknowledgment on February 2, the deduction is not allowed – even if the taxpayer had credit card receipts and other documentation that fully and unambiguously substantiate the deduction. This requirement is inconsistent with congressional policy to encourage charitable giving. We recommend that Congress modify the substantiation rules to require reliable – but not necessarily advance – acknowledgment from the donee organization.

3 See National Taxpayer Advocate Fiscal Year 2020 Objectives Report to Congress, vol. 3 (Special Report: *Earned Income Tax Credit: Making the EITC Work for Taxpayers and the Government*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/JRC20\\_Volume3.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/JRC20_Volume3.pdf).

4 See National Taxpayer Advocate 2022 Annual Report to Congress (Research Study: *Exploring Earned Income Tax Credit Structures: Dividing the Credit Between a Worker and Child Component and Other Considerations*).



- **Clarify That Supervisory Approval Is Required Under IRC § 6751(b) Before Proposing Penalties.** IRC § 6751(b)(1) states: “No penalty under this title shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination... .” At first, it seems a requirement that an “initial determination” be approved by a supervisor would mean the approval must occur before the penalty is proposed. However, the timing of this requirement has been the subject of considerable litigation, with some courts holding that the supervisor’s approval might be timely even if provided after a case has gone through the IRS Independent Office of Appeals and is in litigation. Very few taxpayers litigate their tax disputes. Therefore, to effectuate Congress’s intent that the IRS not penalize taxpayers in certain circumstances without supervisory approval, the approval must be required earlier in the process. We recommend that Congress amend IRC § 6751(b)(1) to require that written supervisory approval be provided before the IRS sends a written communication to the taxpayer proposing a penalty.
- **Require That Math Error Notices Describe the Reason(s) for the Adjustment With Specificity, Inform Taxpayers They May Request Abatement Within 60 Days, and Be Mailed by Certified or Registered Mail.** Under IRC § 6213(b), the IRS may make a summary assessment of tax arising from a mathematical or clerical error. When the IRS does so, it must send the taxpayer a notice describing “the error alleged and an explanation thereof.” By law, the taxpayer has 60 days from the date of the notice to request that the summary assessment be abated. However, many taxpayers do not understand that failing to respond to an IRS math error notice within 60 days means they have conceded the adjustment and forfeited their right to challenge the IRS’s position in the U.S. Tax Court. To ensure taxpayers understand the adjustment and their rights to contest it, we recommend that Congress amend IRC § 6213(b) to require that the IRS specifically describe the error causing to the adjustment and inform taxpayers they have 60 days to request the summary assessment be abated. Additionally, requiring that the notice be sent either by certified or registered mail would underscore the significance of the notice and provide an additional safeguard to ensure that taxpayers receive this critical information.
- **Provide That “an Opportunity to Dispute” an Underlying Liability Means an Opportunity to Dispute Such Liability in a Prepayment Judicial Forum.** IRC §§ 6320(b) and 6330(b) provide taxpayers with the right to request an independent review of either a Notice of Federal Tax Lien (NFTL) filed by the IRS or a proposed levy action. The purpose of this collection due process (CDP) right is to give taxpayers adequate notice of IRS collection activity and provide a meaningful hearing to determine whether the IRS properly filed an NFTL or proposed or initiated a levy. The IRS and the courts interpret the current law to mean that an opportunity to dispute the underlying liability includes a prior opportunity for a conference with the IRS Independent Office of Appeals offered either before or after assessment of the liability, even where there is no opportunity for judicial review of the Appeals conference. The value of CDP proceedings is undermined when taxpayers who have never had an opportunity to dispute the underlying liability in a prepayment judicial forum are precluded from doing so during their CDP hearing. These taxpayers have no alternative but to pay the tax and then seek a refund by suing in a U.S. district court or the U.S. Court of Federal Claims – an option that not all taxpayers can afford. In our view, judicial and administrative interpretations limiting a taxpayer’s ability to challenge the IRS’s liability determination in a CDP hearing are inconsistent with Congress’s intent when it enacted CDP procedures. We recommend that Congress modify these provisions to ensure taxpayers have a right to prepayment judicial review.

- **Provide That Assessable Penalties Are Subject to Deficiency Procedures.** IRC § 6212 requires the IRS to issue a “notice of deficiency” before assessing certain liabilities. IRC § 6671(a) authorizes the IRS to assess some penalties without first issuing a notice of deficiency. These penalties are generally subject to judicial review only if taxpayers first pay the penalties and then sue for a refund. Assessable penalties can be substantial, sometimes running into the millions of dollars. Under IRS interpretation, these penalties include, but are not limited to, foreign information reporting penalties under IRC §§ 6038, 6038A, 6038B, 6038C, and 6038D. The inability of taxpayers to obtain judicial review on a pre-assessment basis and the requirement that taxpayers pay the penalties in full to obtain judicial review on a post-assessment basis can effectively deprive taxpayers of the right to judicial review at all. To ensure taxpayers have an opportunity to obtain judicial review before they are required to pay often huge penalties that they do not believe they owe, we recommend that Congress require the IRS to issue a notice of deficiency before imposing assessable penalties.

## STRENGTHEN TAXPAYER RIGHTS AND TAXPAYER SERVICE

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### Legislative Recommendation #1

## Elevate the Importance of the Taxpayer Bill of Rights by Redesignating It as Section 1 of the Internal Revenue Code

### SUMMARY

- *Problem:* The IRS is arguably the federal agency that Americans fear the most. Without a court order, it can garnish a taxpayer's wages, levy against a taxpayer's bank account, and file a Notice of Federal Tax Lien against a taxpayer's property to collect an IRS-determined tax debt. Taxpayers fear the IRS may take these actions erroneously or without regard to taxpayer rights.
- *Solution:* Redesignate the Taxpayer Bill of Rights (TBOR) as Section 1 of the IRC. While partly symbolic, this change would send an important message to U.S. taxpayers and IRS employees alike that Congress expects IRS employees to respect taxpayer rights and considers them foundational for effective tax administration.

### PRESENT LAW

IRC § 7803(a)(3) requires the Commissioner to “ensure that employees of the Internal Revenue Service are familiar with and act in accord with taxpayer rights as afforded by other provisions of this title [the Internal Revenue Code], including –

- (A) *the right to be informed,*
- (B) *the right to quality service,*
- (C) *the right to pay no more than the correct amount of tax,*
- (D) *the right to challenge the position of the Internal Revenue Service and be heard,*
- (E) *the right to appeal a decision of the Internal Revenue Service in an independent forum,*
- (F) *the right to finality,*
- (G) *the right to privacy,*
- (H) *the right to confidentiality,*
- (I) *the right to retain representation, and*
- (J) *the right to a fair and just tax system.”*

### REASONS FOR CHANGE

Taxpayer rights serve as the foundation for effective tax administration. The U.S. tax system is frequently characterized as a system of “voluntary compliance.” While taxpayers ultimately may face penalties for noncompliance, we rely in the first instance on the willingness of taxpayers to file returns on which they self-report their income (some of which is not reported to the IRS by third parties and is therefore difficult for the IRS to discover in the absence of self-reporting) and to pay the required tax.

In recent years, more than 165 million individuals and more than ten million business entities have filed income tax returns annually, and they are entitled to be treated with respect. Making clear that taxpayers possess rights is not only the right thing to do, but TAS research suggests that when taxpayers have confidence

the tax system is fair, they are more likely to comply voluntarily, which may translate into enhanced revenue collection as well.<sup>1</sup>

The National Taxpayer Advocate recommends that the ten rights that make up the TBOR codified in IRC § 7803(a)(3) be relocated and re-codified as Section 1 of the tax code. Doing so would make a strong and important statement about the value Congress places on taxpayer rights.<sup>2</sup>

## RECOMMENDATION

- Amend § 1 of the IRC to read as follows (and renumber existing IRC §§ 1, 2, and 3 accordingly):

### SECTION 1. TAXPAYER BILL OF RIGHTS.

#### (a) Taxpayer Rights.

(1) In discharging their duties and responsibilities, every officer and employee of the Internal Revenue Service shall act in accordance with taxpayer rights as afforded by other provisions of this title, including –

- (a) the right to be informed,
- (b) the right to quality service,
- (c) the right to pay no more than the correct amount of tax,
- (d) the right to challenge the position of the Internal Revenue Service and be heard,
- (e) the right to appeal a decision of the Internal Revenue Service in an independent forum,
- (f) the right to finality,
- (g) the right to privacy,
- (h) the right to confidentiality,
- (i) the right to retain representation, and
- (j) the right to a fair and just tax system.<sup>3</sup>

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- 1 See National Taxpayer Advocate 2013 Annual Report to Congress vol. 2, at 33-55 (Research Study: *Small Business Compliance: Further Analysis of Influential Factors*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2013-ARC\\_VOL-2-3.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2013-ARC_VOL-2-3.pdf); National Taxpayer Advocate 2012 Annual Report to Congress vol. 2, at 1-70 (Research Study: *Factors Influencing Voluntary Compliance by Small Businesses: Preliminary Survey Results*), <https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/Research-Studies-Factors-Influencing-Voluntary-Compliance-by-Small-Businesses-Preliminary-Survey-Results.pdf>.
  - 2 When we first proposed codifying the Taxpayer Bill of Rights in 2007, we recommended enacting ten taxpayer rights and five taxpayer responsibilities. The responsibilities included (i) the responsibility to be honest, (ii) the responsibility to be cooperative, (iii) the responsibility to provide accurate information and documents on time, (iv) the responsibility to keep records, and (v) the responsibility to pay taxes on time. National Taxpayer Advocate 2007 Annual Report to Congress 478-489 (Legislative Recommendation: *Taxpayer Bill of Rights and De Minimis "Apology" Payments*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/arc\\_2007\\_vol\\_1\\_legislativerec.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/arc_2007_vol_1_legislativerec.pdf). When Congress added the ten rights to IRC § 7803(a)(3), it did not include the responsibilities.
  - 3 The provisions of the TBOR were codified at IRC § 7803(a)(3). See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. Q, § 401(a), 129 Stat. 2242, 3117 (2015). During the drafting of the TBOR language, we understand staff of the Joint Committee on Taxation (JCT) raised concerns that if the TBOR were codified without limitation, some taxpayers might assert purported violations and seek remedies in administrative and litigated disputes, potentially requiring the IRS and the courts to adjudicate vague claims with no clear standards for resolution. After considering the JCT's concerns, the tax-writing committees ultimately settled on the language enacted as IRC § 7803(a)(3). To avoid reopening this issue, we are proposing to relocate the existing language in IRC § 7803(a)(3) virtually without change. We are recommending a minor refinement to the lead-in language that we think makes it read more clearly and does not substantially change the meaning. However, if the JCT believes our refinement does substantially change the meaning, the text of IRC § 7803(a)(3) could be redesignated as IRC § 1 with no change in language at all.

## IMPROVE THE FILING PROCESS

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### Legislative Recommendation #2

## Treat Electronically Submitted Tax Payments and Documents as Timely If Submitted on or Before the Applicable Deadline

### SUMMARY

- *Problem:* If a taxpayer mails a payment or tax return to the IRS that is postmarked by midnight on the date due, the payment or tax return will be considered timely even if it is received a week later. If a payment or tax return is transmitted to the IRS electronically by the date due, however, it will be considered late if the IRS receives and processes it the next day. This dichotomy favors paper transmission over electronic transmission – exactly the opposite incentive that the rules should provide.
- *Solution:* Provide that a payment or document submitted by midnight on the date due will be considered timely even if the IRS does not receive and process it that day.

### PRESENT LAW

IRC § 7502(a)(1) provides that if certain requirements are satisfied, a mailed document or payment is deemed filed or paid on the date of the postmark stamped on the envelope. Therefore, if the postmark shows a document or payment was mailed by the due date, it will be considered timely, even if it is received after the due date.

IRC § 7502(b) and (c) provide that this timely mailed/timely filed rule (commonly known as the “mailbox rule”) applies to documents and payments sent by U.S. postal mail, designated private delivery services, and electronic filing through an electronic return transmitter. However, the statutory mailbox rule does not apply to all filings and payments. With respect to electronic filing, the Secretary is authorized to issue regulations describing the extent to which the mailbox rule shall apply.<sup>1</sup> To date, the only regulations the Secretary has promulgated relating to electronic filing cover documents filed through an electronic return transmitter (*i.e.*, documents that are e-filed).<sup>2</sup>

### REASONS FOR CHANGE

The statutory mailbox rule in IRC § 7502 does not apply to the electronic transmission of payments to the IRS. In addition, the mailbox rule does not apply to the electronic filing of time-sensitive documents (except documents filed electronically through an electronic return transmitter), including those transmitted by fax, email, the digital communication portal, or upload to an online account.<sup>3</sup> If the IRS does not receive an electronically submitted document or payment until after the due date, the document or payment is considered late, even if the taxpayer can produce a confirmation that he or she transmitted the payment or document on or before the due date. This comparatively unfavorable treatment of electronically submitted documents and payments undermines the IRS’s efforts to encourage greater use of digital services and imposes additional cost and burden on taxpayers and the IRS.

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1 IRC § 7502(c)(2). While this provision authorizes the Secretary to extend the mailbox rule for electronic filing, it does not authorize the Secretary to extend the mailbox rule for electronic payments.

2 Treas. Reg. § 301.7502-1(d).

3 See Treas. Reg. § 301.7502-1(d)(3)(i) (containing a definition of an electronic return transmitter). See also Rev. Proc. 2007-40, 2007-1 C.B. 1488 (providing a list of documents that can be filed electronically with an electronic return transmitter).

Along similar lines, the IRS encourages U.S. taxpayers to make payments electronically using the Treasury Department's Electronic Federal Tax Payment System (EFTPS). However, the EFTPS website displays the following warning: "Payments using this Web site or our voice response system must be scheduled by **8 p.m. ET the day before the due date** to be received timely by the IRS" (emphasis in original).<sup>4</sup> This limitation applies to all payments.

*Example:* Based on the bolded language on the EFTPS website, if a taxpayer owes a balance due on April 15 and mails the payment to the IRS before midnight on April 15, the payment will be considered timely, even if it takes a week or longer for the IRS to receive, open, and process the check. If the same taxpayer submits the payment using EFTPS, the payment will be considered late if submitted after 8 p.m. on April 14 (28 hours earlier), even though the payment generally would be debited from the taxpayer's account on April 16 – often a week sooner than if submitted by postal mail.

This disparity in the treatment of mailed and electronically submitted payments makes little sense. As compared with a mailed check, an electronic payment is received more quickly, is cheaper to process, and eliminates the risk that a mailed check will be lost or misplaced. Yet, rather than encouraging taxpayers to use EFTPS, an earlier deadline serves as a deterrent.

Despite the bolded warning on the main EFTPS website, the related FAQs describe circumstances in which the IRS will credit both business and individual tax payments on the date the payment is made.<sup>5</sup> For example, the FAQs state that business tax payments of \$1 million or less made before 3 p.m. ET on the due date will be considered timely. While 3 p.m. ET on the due date is certainly better than 8 p.m. ET the day before the due date, the parameters detailed in the FAQs do not go far enough. In addition, it is unclear why the Treasury Department chose to bury the more flexible time periods in the FAQs. Given these limitations and the temporary nature of FAQs and website information, the National Taxpayer Advocate recommends that Congress amend the mailbox rule in IRC § 7502 to add permanence and common sense so that taxpayers can rely on the timeliness of electronically submitted payments.

## RECOMMENDATION

- Amend IRC § 7502 to direct the Secretary to issue regulations that apply the statutory mailbox rule to all time-sensitive documents and payments electronically submitted to the IRS in a manner comparable to similar documents and payments submitted through the U.S. Postal Service or a designated delivery service.

<sup>4</sup> See EFTPS, <https://www.eftps.gov/eftps> (last visited Oct. 27, 2022).

<sup>5</sup> EFTPS Frequently Asked Questions, What if I have to make a payment that is due today?, <https://www.eftps.gov/eftps/direct/FAQGeneral.page> (last visited Oct. 27, 2022).

**Legislative Recommendation #3****Authorize the IRS to Establish Minimum Competency Standards for Federal Tax Return Preparers****SUMMARY**

- *Problem:* The majority of paid tax return preparers are non-credentialed, and some have no training or experience. Taxpayers are harmed when incompetent tax return preparers make errors that cause them to pay too much tax, deprive them of receiving certain tax benefits, or subject them to IRS tax adjustments and penalties for understating their tax.
- *Solution:* Require paid non-credentialed tax return preparers to pass a basic competency test, meet specified standards of conduct, and take annual continuing education courses about federal tax laws and procedures impacting federal tax return preparation.

**PRESENT LAW**

Federal law imposes no competency or licensing requirements on paid tax return preparers. Credentialed individuals who may prepare tax returns, including attorneys, certified public accountants (CPAs), and enrolled agents (EAs), are generally required to pass competency tests and take continuing education courses (including an ethics component). Volunteers who prepare tax returns as part of the Volunteer Income Tax Assistance and Tax Counseling for the Elderly programs also must pass competency tests. However, the vast majority of paid preparers are non-credentialed and are not required to pass competency tests, take any courses in tax return preparation, or follow prescribed standards of conduct.

**REASONS FOR CHANGE**

In recent years, the IRS has received over 160 million individual income tax returns annually, and paid tax return preparers prepare the majority of these returns. Both taxpayers and the tax system depend heavily on the ability of preparers to prepare accurate tax returns. Yet numerous studies have found that non-credentialed tax return preparers routinely prepare inaccurate returns, which harms taxpayers and the public fisc.

To protect the public, federal and state laws generally require lawyers, CPAs, doctors, securities dealers, financial planners, actuaries, appraisers, contractors, motor vehicle operators, and even barbers and beauticians to obtain licenses or certifications and, in most cases, to pass competency tests. Taxpayers and the tax system would benefit from requiring tax return preparers to pass minimum competency tests.

The following studies illustrate the extent – and adverse consequences – of inaccurate return preparation by unenrolled tax return preparers:

*Government Accountability Office (GAO).* In 2006, GAO auditors posing as taxpayers made 19 visits to several national tax return preparation chains in a large metropolitan area. Using two carefully designed fact patterns, they sought assistance in preparing tax returns. On 17 of 19 returns, preparers computed the wrong refund amounts with variations of several thousand dollars. In five cases, the prepared returns reflected unwarranted excess refunds of nearly \$2,000. In two cases, the prepared returns would have caused the taxpayer to overpay by more than \$1,500 (*e.g.*, by not claiming all deductions or other tax benefits for which the taxpayer qualified). In five out of ten cases in which the Earned Income Tax Credit (EITC) was claimed, preparers



failed to ask where the auditor's child lived or ignored the auditor's answer and prepared returns claiming ineligible children. In 10 of 19 cases, business income was not reported.<sup>1</sup>

The GAO conducted a similar study in 2014. It again found that preparers computed the wrong tax liability on 17 of the 19 returns.<sup>2</sup>

*Treasury Inspector General for Tax Administration (TIGTA).* In 2008, TIGTA auditors posing as taxpayers visited 12 commercial chains and 16 small, independently owned tax return preparation offices in a large metropolitan area. All preparers visited by TIGTA were non-credentialed. Of 28 returns prepared, 61 percent were prepared incorrectly. The average net understatement was \$755 per return. Of seven returns involving EITC claims, none of the non-credentialed preparers exercised due diligence as required under IRC § 6695(g).<sup>3</sup>

*New York State Department of Taxation and Finance.* During 2008 and 2009, agents conducted nearly 200 targeted covert visits in which they posed as taxpayers and sought assistance in preparing income or sales tax returns. In remarks made at an IRS Public Forum, the Acting Commissioner of the New York Department of Taxation and Finance stated that investigators found “an epidemic of unethical and criminal behavior.”<sup>4</sup> At one point, the Department reported that it had found fraud on about 40 percent of its visits, and it had made over 20 arrests and secured 13 convictions.<sup>5</sup>

*IRS Study on EITC Noncompliance.* The IRS conducted a study to estimate compliance with EITC requirements during the 2006-2008 period. Among the findings of the study, unaffiliated unenrolled preparers (*i.e.*, non-credentialed preparers who are not affiliated with a national tax return preparation firm) were responsible for “the highest frequency and percentage of EITC overclaims.” The study found that half of the EITC returns prepared by unaffiliated unenrolled preparers contained overclaims, and the overclaims averaged between 33 percent and 40 percent.<sup>6</sup>

In 2002, before these studies were published, the National Taxpayer Advocate recommended that Congress authorize the IRS to conduct preparer oversight. Her proposal received widespread support from stakeholders and members of Congress. The Senate Committee on Finance twice approved legislation authorizing preparer oversight on a bipartisan basis under the leadership of Chairman Grassley and Ranking Member Baucus.<sup>7</sup>

1 GAO, GAO-06-563T, *Paid Tax Return Preparers: In a Limited Study, Chain Preparers Made Serious Errors* (2006).

2 GAO, GAO-14-467T, *Paid Tax Return Preparers: In a Limited Study, Preparers Made Significant Errors* (2014).

3 TIGTA, Ref. No. 2008-40-171, *Most Tax Returns Prepared by a Limited Sample of Unenrolled Preparers Contained Significant Errors* (2008).

4 Jamie Woodward, Acting Commissioner, New York Dept. of Taxation and Finance, Remarks at the IRS Tax Return Preparer Review Public Forum (Sept. 2, 2009).

5 *Id.* See also Tom Herman, *New York Sting Nabs Tax Preparers*, WALL ST. J. (Nov. 26, 2008).

6 IRS Pub. 5162, *Compliance Estimates for the Earned Income Tax Credit Claimed on 2006-2008 Returns* 24-26 (Aug. 2014).

7 Tax Administration Good Government Act, H.R. 1528, 108th Cong. § 141 (2004) (incorporating Tax Administration Good Government Act, S. 882); Telephone Excise Tax Repeal and Taxpayer Protection and Assistance Act of 2006, S. 1321, 109th Cong. § 203 (2006) (incorporating Taxpayer Protection and Assistance Act of 2005, S. 832).

On one occasion, the full Senate approved the legislation by unanimous consent.<sup>8</sup> In 2005, the House Ways and Means Subcommittee on Oversight held a hearing at which representatives of five outside organizations expressed general support for preparer oversight.<sup>9</sup> Several of the same organizations reiterated that support as recently as last year.<sup>10</sup>

In 2009, the Commissioner of Internal Revenue concluded that the IRS had the authority under § 330 of Title 31 of the U.S. Code to regulate tax return preparation as “practice” before the IRS. The IRS initiated extensive hearings and discussions with stakeholder groups to receive comments and develop a system within which all parties believed they could operate.<sup>11</sup> The IRS, together with the Treasury Department, implemented the program in 2011. However, it was terminated two years later after a U.S. district court upheld a challenge to the IRS’s authority under 31 U.S.C. § 330 to regulate tax return preparation. The court concluded that “mere” tax return preparation did not constitute “practice” before the IRS.<sup>12</sup>

The IRS subsequently created a voluntary “Annual Filing Season Program.” Non-credentialed preparers who participate must meet specific requirements, including taking 18 hours of continuing education each year, which includes an examined tax refresher course. If they meet the requirements, the IRS provides them with a “Record of Completion” that they presumably can use in their marketing to attract potential clients.<sup>13</sup> The D.C. Circuit has upheld the IRS’s authority to implement this program.<sup>14</sup> However, the program is less rigorous than the one the IRS implemented in 2011, and most non-credentialed preparers do not participate. This voluntary program does not satisfy the objectives of a comprehensive regime.

Since the 2011 program was invalidated, House and Senate members have introduced legislation to provide the IRS with the statutory authority to establish and enforce minimum standards. In the Senate, Senators Portman and Cardin sponsored bipartisan authorizing legislation in 2018,<sup>15</sup> and Senators Wyden and Cardin sponsored similar legislation in 2019.<sup>16</sup> In the House, Congressman Panetta and Congressman Rice sponsored bipartisan authorizing legislation in 2021.<sup>17</sup> In 2015, former Congresswoman Black and former Congressman Becerra, both members of the Ways and Means Committee, sponsored similar legislation.<sup>18</sup> Consistent with the position of both the Obama and Trump Administrations, the Department of the Treasury included a legislative proposal in its fiscal year 2023 revenue proposals to provide the Secretary with explicit authority to regulate all paid preparers of federal tax returns by establishing mandatory minimum competency standards.<sup>19</sup>

8 Tax Administration Good Government Act, H.R. 1528, 108th Cong. § 141 (2004) (incorporating Tax Administration Good Government Act, S. 882).

9 The organizations were the American Bar Association, the American Institute of Certified Public Accountants, the National Association of Enrolled Agents, the National Society of Accountants, and the National Association of Tax Professionals. See *Fraud in Income Tax Return Preparation: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 109th Cong. (2005).

10 William Hoffman, *Tax Groups and Conservatives Gird for Battle Over Preparer Regs*, TAX NOTES TODAY, (Aug. 2, 2021) (discussion of organizations supporting Taxpayer Protection and Proficiency Act).

11 See IRS Pub. 4832, Return Preparer Review (Dec. 2009).

12 *Loving v. IRS*, 917 F. Supp. 2d 67 (D.D.C. 2013), *aff’d*, 742 F.3d 1013 (D.C. Cir. 2014).

13 Rev. Proc. 2014-42, 2014-29 I.R.B. 192.

14 *AICPA v. IRS*, 746 Fed. App’x 1 (D.C. Cir. 2018).

15 Protecting Taxpayers Act, S. 3278, 115th Cong. § 202 (2018).

16 Taxpayer Protection and Preparer Proficiency Act of 2019, S. 1192, 116th Cong. (2019).

17 Taxpayer Protection and Preparer Proficiency Act of 2021, H.R. 4184, 117th Cong. (2021).

18 See Tax Return Preparer Competency Act of 2015, H.R. 4141, 114th Cong. § 2 (2015) (Cong. Black) and Taxpayer Rights Act of 2015, H.R. 4128, 114th Cong. § 202 (2015) (Cong. Becerra).

19 Department of the Treasury, *General Explanations of the Administration’s Fiscal Year 2023 Revenue Proposals* 83-86 (Mar. 2022), <https://home.treasury.gov/system/files/131/General-Explanations-FY2023.pdf>.

The IRS's Taxpayer Experience Strategy provides an additional reason for establishing preparer standards.<sup>20</sup> The IRS envisions giving preparers access to taxpayer information through online accounts. While there are considerable benefits to this plan, there are also significant security risks, including identity theft and other fraud. As the examples above demonstrate, the absence of standards for tax return preparers exacerbates unethical behavior, including fraud. These risks would be mitigated by the adoption of minimum standards for tax return preparers.

Some have argued that requiring preparers to pass a competency test and take annual continuing education courses would address competence but would not ensure preparers conduct themselves ethically. The National Taxpayer Advocate agrees that tax law competency and ethical conduct are distinct issues. However, we believe preparer standards would raise both competency and ethical conduct levels. A preparer who invests in learning enough about tax return preparation to pass a competency test and takes annual continuing education courses would demonstrate a commitment to return preparation as a profession. The preparer would be a vested partner in the tax system and would have more to lose if he or she is found to have engaged in misconduct, just like attorneys, CPAs, EAs, and other credentialed preparers. If tax return preparation is characterized as “practice” before the IRS – as the 2011 plan did – the Office of Professional Responsibility would have oversight authority over preparers and could impose sanctions in cases of unethical conduct.

In sum, the GAO, TIGTA, and other compliance studies described above have consistently found that tax returns prepared by non-credentialed preparers are often inaccurate. Minimum standards would directly improve preparer competency levels and are likely to raise ethical norms.

## RECOMMENDATION

- Amend Title 31, § 330 of the U.S. Code to authorize the Secretary to establish minimum standards for paid federal tax return preparers.<sup>21</sup>

<sup>20</sup> IRS Pub. 5426, Taxpayer First Act Report to Congress 42-45 (Jan. 2021).

<sup>21</sup> For legislative language generally consistent with this recommendation, see Taxpayer Protection and Preparer Proficiency Act of 2019, S. 1192 & H.R. 3330, 116th Cong. (2019) and other bills cited herein.

**Legislative Recommendation #4****Extend the Time for Small Businesses to Make Subchapter S Elections****SUMMARY**

- *Problem:* Individuals who incorporate their sole proprietorships or small businesses often miss the deadline for electing to be treated as an “S” corporation because the election deadline generally precedes the filing deadline for the corporation’s first income tax return. Taxpayers routinely obtain permission to make late elections but at considerable cost and hassle for the business and the IRS alike.
- *Solution:* Allow taxpayers to elect “S” status on their first timely filed corporation income tax return.

**PRESENT LAW**

IRC § 1362(b)(1) provides that a small business corporation (S corporation) may elect to be treated as a passthrough entity by making an election at any time during the preceding taxable year or at any time on or before the 15th day of the third month of the current taxable year. The prescribed form for making this election is Form 2553, Election by a Small Business Corporation.

IRC § 6072(b) provides that income tax returns of S corporations made on a calendar-year basis must be filed on or before March 15 following the close of the calendar year, and income tax returns of S corporations made on a fiscal year basis must be filed on or before the 15th day of the third month following the close of the taxable year.

**REASONS FOR CHANGE**

Many small business owners are not familiar with the rules governing S corporations, and they learn about the ramifications of S corporation status for the first time when they hire a tax professional to prepare their corporation’s income tax return for its first year of operation. By that time, the deadline for electing S corporation status has passed. Failure to make a timely S corporation election can cause significant adverse tax consequences for businesses, such as incurring taxation at the corporate level and rendering shareholders ineligible to deduct operating losses on their individual income tax returns.<sup>1</sup> For context, over five million S corporation returns were filed in fiscal year 2021, which accounted for 71 percent of all corporate returns.

Taxpayers may seek permission from the IRS to make a late S corporation election under Revenue Procedure 2013-30 or through a private letter ruling (PLR) request. Under the revenue procedure, a corporation that failed to timely file Form 2553 may request relief by filing Form 2553 within three years and 75 days of the date the election is intended to be effective. In addition, the corporation must attach a statement explaining its reasonable cause for failing to timely file the election and its diligent actions to correct the mistake upon its discovery.

Finally, all shareholders must sign a statement affirming they have reported their income on all affected returns as if the S corporation election had been timely filed (*i.e.*, during the period between the date the S corporation election would have become effective if timely filed and the date the completed election form is

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<sup>1</sup> The value of an S corporation election increased for many taxpayers with the passage of the Tax Cuts and Jobs Act, which generally allows individual taxpayers to deduct 20 percent of domestic “qualified business income” (QBI) from a passthrough business, including an S corporation, effectively reducing the individual income tax rate on such income by 20 percent. The deduction is subject to certain income thresholds (first \$315,000 of QBI for joint filers and \$157,500 for single returns), phase-outs for professional services, and limitations based on W-2 wages paid or capital invested by a business owner for larger pass-through entities. See IRC § 199A; Pub. L. No. 115-97, § 11011 (2017); H.R. REP. NO. 115-466, at 205-224 (2017) (CONF. REP.).

filed). If an entity cannot comply with the revenue procedure, it may request relief through a PLR, for which the IRS charges a user fee ranging from \$6,200 to \$30,000 per request.<sup>2</sup>

The S corporation election deadline burdens small businesses by requiring them to pay tax professionals and often IRS user fees to request permission to make a late election. It also burdens shareholders because when the IRS rejects an S corporation return due to the absence of a timely election, the status of the corporation is affected, and that may cause changes on the shareholders' personal income tax returns. In addition, the deadline and relief procedures require a commitment of significant resources by the IRS to process late-election requests.

Because small business owners often consider the S corporation election for the first time when they prepare their company's first income tax return, the burdens described above would be substantially eliminated if corporations could make an S corporation election on their first timely filed income tax return.

## RECOMMENDATION

- Amend IRC § 1362(b)(1) to allow a small business corporation to elect to be treated as an S corporation by checking a box on its first timely filed Form 1120S, U.S. Income Tax Return for an S Corporation, (including extensions).<sup>3</sup>

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<sup>2</sup> See Rev. Proc. 2020-1, 2020-1 I.R.B. 1. User fees for PLRs are set forth in the first revenue procedure of each year.

<sup>3</sup> For legislative language generally consistent with this recommendation, see Protecting Taxpayers Act, S. 3278, 115th Cong. § 304 (2018).

**Legislative Recommendation #5****Adjust Individual Estimated Tax Payment Deadlines to Occur Quarterly****SUMMARY**

- *Problem:* Estimated tax installment payments for individual taxpayers are sometimes referred to as “quarterly payments,” but they are not due at even three-month intervals. Rather, they are spaced at three-month, two-month, three-month, and four-month intervals (April 15, June 15, September 15, and January 15, respectively). This is confusing to taxpayers and can make it difficult for them to calculate their net income; few businesses keep their books and records based on these uneven cutoff dates.
- *Solution:* Revise the estimated tax payment deadlines so they fall at even quarterly intervals.

**PRESENT LAW**

Under IRC § 6654(c), individual taxpayers generally are required to make estimated tax payments in four installments due on or before April 15, June 15, September 15, and January 15. Under IRC § 6654(l), the same deadlines generally apply for estates and trusts.<sup>1</sup>

**REASONS FOR CHANGE**

Although estimated tax installment payments are sometimes referred to as “quarterly payments,” they do not align with calendar year quarters, and the payment dates are not evenly spaced. The April 15 and June 15 installments are due two months apart; the June 15 and September 15 installments are due three months apart; the September 15 and January 15 installments are due four months apart; and the January 15 and April 15 installments are due three months apart.

These dates are not intuitive and create compliance burdens. Small business owners and self-employed individuals are particularly affected by the estimated tax rules because their incomes generally are not subject to wage withholding. Yet small businesses are far more likely to keep their books based on regular three-month quarters than based on the seemingly random intervals prescribed by IRC § 6654.

These uneven intervals make it more difficult for many taxpayers to calculate net income and save appropriately to make estimated tax payments and thus may reduce compliance.<sup>2</sup> They also cause confusion, as taxpayers struggle to remember the due dates. This confusion affects both traditionally self-employed workers and workers in the gig economy. Setting due dates to fall 15 days after the end of each calendar quarter would make it substantially easier for taxpayers to remember and comply with the due dates.

<sup>1</sup> IRC § 6654(j) requires certain non-resident aliens to make three estimated tax payments, which are due on June 15, September 15, and January 15. The June 15 date coincides with the due date for Form 1040-NR, U.S. Nonresident Alien Income Tax Return, as provided in IRC § 6072(c). If this proposal is adopted, we recommend the second payment deadline be changed from September 15 to October 15 for consistency. IRC § 6655(c) generally requires corporate taxpayers to make estimated tax payments in four installments due on April 15, June 15, September 15, and December 15. Some of the benefits of establishing uniform quarterly estimated payment deadlines apply to corporate taxpayers to the same extent as individuals. However, we have not analyzed the implications of changing the corporate estimated payment deadlines, so this recommendation is limited to the deadline applicable to individual taxpayers.

<sup>2</sup> Treasury Inspector General for Tax Administration, Ref. No. 2004-30-040, *While Progress Toward Earlier Intervention With Delinquent Taxpayers Has Been Made, Action Is Needed to Prevent Noncompliance With Estimated Tax Payment Requirements* 12 (2004).

## RECOMMENDATION

- Amend IRC § 6654(c)(2) to set the estimated tax installment deadlines 15 days after the end of each calendar quarter (*i.e.*, April 15, July 15, October 15, and January 15).<sup>3</sup>

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<sup>3</sup> For legislative language generally consistent with this recommendation, see Tax Deadline Uniformity Act of 2020, H.R. 5979, 116th Cong. § 2 (2020). See also Tax Deadline Simplification Act, H.R. 4214, 117th Cong. § 2 (2021); Protecting Taxpayers Act, S. 3278, 115th Cong. § 305 (2018); Small Business Owners' Tax Simplification Act of 2017, H.R. 3717, 115th Cong. § 2 (2017).



**Legislative Recommendation #6****Eliminate Duplicative Reporting Requirements Imposed by the Bank Secrecy Act and the Foreign Account Tax Compliance Act****SUMMARY**

- *Problem:* U.S. taxpayers with foreign accounts and assets currently are subject to two sets of foreign financial asset information reporting requirements – one for the IRS and one for the Financial Crimes Enforcement Network (FinCEN). Much of the information requested by these two Treasury Department bureaus is duplicative, yet affected individuals must complete separate forms for each, and they are subject to significant penalties for failure to report certain accounts or assets on one or both forms, even when little or no tax is owed.
- *Solution:* Reduce taxpayer reporting burden and government costs to process and store the same or similar information twice by eliminating duplicative filing requirements for taxpayers with foreign accounts and assets.

**PRESENT LAW**

The Currency and Foreign Transaction Reporting Act of 1970 (commonly known as the Bank Secrecy Act) requires U.S. citizens and residents to report each foreign account in which they have a financial interest or over which they have signature or other authority to FinCEN when the combined value of those accounts exceeds \$10,000 at any time during the calendar year.<sup>1</sup> FinCEN Report 114, Report of Foreign Bank and Financial Accounts (FBAR), has been prescribed for complying with this requirement.

The Foreign Account Tax Compliance Act (FATCA) added IRC § 6038D, which requires U.S. citizens, resident aliens, and certain non-resident aliens to file a statement with their federal income tax returns to report certain foreign financial assets exceeding specified thresholds.<sup>2</sup> IRS Form 8938, Statement of Specified Foreign Financial Assets, has been prescribed for complying with this requirement. IRC § 6038D authorizes the IRS to issue regulations or other guidance to provide exceptions from FATCA reporting when such reporting would duplicate other disclosures.

**REASONS FOR CHANGE**

Many U.S. taxpayers, particularly those living abroad, face increased compliance burdens and costs because the FATCA reporting obligations significantly overlap with the FBAR filing requirements.<sup>3</sup> According to a recent Government Accountability Office (GAO) report, “the duplicative reporting of foreign financial asset data on two different forms also creates additional costs to the government to process and store the same or similar information twice, and enforce reporting compliance with both requirements.”<sup>4</sup> The IRS has exercised its regulatory authority to eliminate duplicative reporting of assets on Form 8938 if the assets are reported or reflected on certain other timely filed international information returns (*e.g.*, Forms 3520, 3520A, 5471, 8621, or 8865).<sup>5</sup> The IRS has also provided an exception from the reporting rules for *bona fide* residents of U.S. possessions for certain financial assets held in such possessions.<sup>6</sup>

1 See 31 U.S.C. § 5314 and 31 C.F.R. § 1010.306(c).

2 Pub. L. No. 111-147, Title V, Subtitle A, 124 Stat. 71, 97-117 (2010); IRC § 6038D(a) & (b).

3 IRS, Comparison of Form 8938 and FBAR Requirements, <https://www.irs.gov/businesses/comparison-of-form-8938-and-fbar-requirements> (last visited May 18, 2022).

4 GAO, GAO-19-180, *Foreign Asset Reporting: Actions Needed to Enhance Compliance Efforts, Eliminate Overlapping Requirements, and Mitigate Burdens on U.S. Persons Abroad* (2019).

5 Treas. Reg. § 1.6038D-7(a)(1).

6 Treas. Reg. § 1.6038D-7(c).

However, the IRS has not adopted the recommendations of the National Taxpayer Advocate that are also supported by other stakeholders, including the GAO, to substantially reduce duplicative FATCA reporting where assets have been reported on an FBAR.<sup>7</sup> Although FBARs are filed with FinCEN, the IRS has been delegated responsibility from FinCEN to enforce compliance with the FBAR reporting requirements and thus has access to the information on those forms.<sup>8</sup>

We recognize that the FATCA and FBAR statutes serve different purposes and that information collected on foreign financial assets under the two statutes therefore may be inconsistent.<sup>9</sup> For example, foreign hedge funds and foreign private equity funds are specified foreign financial assets reported on Form 8938 but are not reported on an FBAR. Conversely, indirect interests in foreign financial assets through an entity are reported on an FBAR but are not required to be reported on Form 8938. However, we believe two different bureaus within the same cabinet department (Treasury) can and should coordinate the information collected and harmonize the information collection procedures to reduce the compliance burden for taxpayers.

We are also aware of administrative implications for the IRS when working with Title 31 requirements and FinCEN guidance related to the disclosure of FBARs, statutes of limitation, investigations, penalties, collections, and the like that differ from the rules contained in the IRC. However, we believe the reduction of taxpayer burden associated with largely duplicative reporting outweighs the administrative inconvenience for the IRS. We concur with the GAO's assessment that a legislative change to the FBAR and FATCA reporting requirements is necessary to eliminate overlapping reporting requirements and collection of duplicative information while still retaining access to the information both for tax compliance and criminal law enforcement purposes.<sup>10</sup>

Finally, the IRS has not adopted the National Taxpayer Advocate's recommendation to provide a limited exception from FATCA reporting for financial accounts held in the country in which the U.S. taxpayer is a *bona fide* resident.<sup>11</sup> If adopted, these recommendations would reduce compliance burdens for U.S. taxpayers who currently must file additional complex forms themselves or pay higher fees to tax professionals to do it for them, and potentially would reduce the government resources required to process and store the same or similar information twice.

## RECOMMENDATIONS

- Amend IRC § 6038D and 31 U.S.C. § 5314 to eliminate duplicative reporting of assets on Form 8938 where a foreign financial account is correctly reported or reflected on an FBAR while ensuring continued IRS access to foreign financial asset data for both tax compliance and financial crime enforcement purposes.

7 See, e.g., GAO, GAO-12-403, *Reporting Foreign Accounts to the IRS: Extent of Duplication Not Currently Known, But Requirements Can Be Clarified* (2012) (The GAO recommended that Treasury direct the Office of Tax Policy, the IRS, and FinCEN to determine whether the benefits of implementing a less duplicative reporting process exceed the costs and, if so, to implement that process.).

8 The authority to enforce the FBAR reporting requirements has been redelegated from FinCEN to the Commissioner of Internal Revenue by means of a Memorandum of Agreement between FinCEN and the IRS. See 31 C.F.R. § 1010.810(g).

9 While FATCA allows the IRS to identify taxable income from foreign sources and is designed to improve the IRS's ability to curb taxpayer noncompliance, the information reported on the FBAR is collected to identify money laundering, financial crimes, and certain tax, regulatory, and counterterrorism issues.

10 GAO, GAO-19-180, *Foreign Asset Reporting: Actions Needed to Enhance Compliance Efforts, Eliminate Overlapping Requirements, and Mitigate Burdens on U.S. Persons Abroad* 26 (2019).

11 See generally IRC § 911(d)(1)(A); Treas. Reg. § 1.911-2(c).

- Amend IRC § 6038D to exclude financial accounts maintained by a financial institution organized under the laws of the country of which the U.S. person is a *bona fide* resident from the specified foreign financial assets required to be reported on Form 8938.<sup>12</sup>
- Authorize the Secretary of the Treasury to issue regulations under Titles 26 and 31 to harmonize FBAR and FATCA reporting requirements to eliminate duplication and direct the Secretary to issue such regulations within one calendar year from the effective date of the legislation.

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<sup>12</sup> For legislative language similar to this recommendation, see The Overseas Americans Financial Access Act, H.R. 4362, 116th Cong. §§ 2 & 3 (2019) (providing an exception from certain reporting requirements with respect to the foreign accounts of individuals who are *bona fide* residents of the countries in which their accounts are maintained); H.R. 2136, 115th Cong. §§ 1 & 2 (2017) (same).

## IMPROVE ASSESSMENT AND COLLECTION PROCEDURES

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### Legislative Recommendation #7

## Require That Math Error Notices Describe the Reason(s) for the Adjustment With Specificity, Inform Taxpayers They May Request Abatement Within 60 Days, and Be Mailed by Certified Mail

### SUMMARY

- *Problem:* Each year, the IRS sends millions of “math error” notices to taxpayers that propose to adjust their tax liabilities. These notices often do not explain the reason for the adjustments, are never received by the taxpayer, and/or do not state that the taxpayer must dispute the adjustments within 60 days or generally forfeit the right to do so.
- *Solution:* Require that all math error notices provide a clear explanation of the error alleged, be sent via certified or registered mail, and inform taxpayers they have 60 days from the date of the notice to request that the math error adjustment be abated or the adjustment generally will become final.

### PRESENT LAW

Under IRC § 6213(b) the IRS may make a summary assessment of tax arising from a mathematical or clerical error, as defined in IRC § 6213(g). Summary assessment is often referred to as “math error” authority. When the IRS makes a math error adjustment, IRC § 6213(b)(1) requires it to send the taxpayer a notice describing “the error alleged and an explanation thereof.” By law, the taxpayer has 60 days from the date of the notice to request that the summary assessment be abated.<sup>1</sup> If the taxpayer does not make an abatement request within 60 days, the assessment becomes final, and the taxpayer has lost his or her right to challenge the IRS’s position in the Tax Court. If the taxpayer requests an abatement, the IRS must abate the summary assessment. If the IRS continues to believe the taxpayer owes the tax, it may audit the taxpayer and propose an adjustment by issuing a notice of deficiency. If the IRS does so, the taxpayer will have the right to challenge the IRS’s position in the Tax Court.

### REASONS FOR CHANGE

Many taxpayers do not understand that the failure to respond to an IRS math error notice within 60 days means they have conceded the adjustment and, except in limited circumstances, have forfeited their right to challenge the IRS’s position in the Tax Court. Notably, the law does not specify how the IRS must describe the math error or require the IRS to inform taxpayers they have 60 days to request the math error assessment be reversed. Further, unlike a statutory notice of deficiency, which carries consequences similar to that of a math error notice (*i.e.*, assessment of tax that may result in future collection actions), IRC § 6213 does not require the IRS to send a math error notice by certified or registered mail.<sup>2</sup>

Although the statute requires the IRS to “set forth the error alleged and an explanation thereof” in a notice, the descriptions are often very general. Some notices provide taxpayers with a list of possible errors – leaving

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<sup>1</sup> IRC § 6213(b)(2)(A).

<sup>2</sup> IRC § 6212(a) (“If the Secretary determines that there is a deficiency in respect of any tax imposed ... he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.”).

them uncertain which error, if any, was committed. Other notices indicate that a taxpayer understated his or her adjusted gross income but do not specify which item of gross income was understated. Further, during calendar year 2021, the IRS neglected to include language informing taxpayers they have 60 days to request an abatement in about 6.5 million math error notices.<sup>3</sup> Although the IRS later corrected this omission by sending taxpayers letters explaining the 60-day period, many taxpayers were left confused about what they needed to do, if anything.

It is unclear whether the IRS's explanation of alleged errors satisfies the statutory requirement when it makes a general statement or states that the error is due to one of multiple possible causes, as the statute does not describe the degree of specificity required. However, it is clear that the omission of the 60-day language from math error notices does not invalidate the notices, because IRC § 6213(b) does not require the IRS to tell taxpayers they have 60 days to request an abatement. While the IRS generally does so, the practice should not be discretionary.

Amending IRC § 6213(b) to require that the IRS specifically describe the error giving rise to the adjustment and inform taxpayers they have 60 days to request that the summary assessment be abated would help ensure taxpayers understand the adjustment and their rights. Additionally, requiring the notice be sent by either certified or registered mail would underscore the significance of the notice and be yet another safeguard to ensure that taxpayers are receiving this critical information.

## RECOMMENDATIONS

- Amend IRC § 6213(b)(1) to require that:
  - All math error notices provide a detailed explanation of the specific error, including the line number on the return or the line number on the schedule (whichever is more specific) on which the alleged error was made.
  - All math error notices include a statement that the taxpayer has 60 days from the date of the notice to request that the summary assessment be abated and prominently display at the top of the notice the date on which the 60-day period expires.
  - All such notices will be sent by either certified or registered mail.

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3 Erin M. Collins, Math Error, Part II: Math Error Notices Aren't Just Confusing; Millions of Notices Adjusting the Recovery Rebate Credit Also Omitted Critical Information, NATIONAL TAXPAYER ADVOCATE BLOG (Aug. 3, 2021), <https://www.taxpayeradvocate.irs.gov/news/nta-blog-math-error-part-ii-math-error-notices-arent-just-confusing-millions-of-notices-adjusting-the-recovery-rebate-credit-also-omitted-critical-information/>.

**Legislative Recommendation #8****Continue to Limit the IRS's Use of "Math Error Authority" to Clear-Cut Categories Specified by Statute****SUMMARY**

- *Problem:* The IRC provides taxpayers with "deficiency procedures" that generally give them certain rights to challenge an IRS determination that they owe tax, but it gives the IRS the authority to bypass deficiency procedures and summarily assess tax when a tax return contains one of 22 categories of "mathematical or clerical errors" (often referred to as "math errors"). On several occasions, the Department of the Treasury and the IRS have requested that Congress grant them the authority to add new categories of math errors by regulation. This would have the effect of depriving taxpayers of deficiency procedures in a wider range of circumstances.
- *Solution:* Congress should retain the authority to revise categories of math errors legislatively and not give the Department of the Treasury and the IRS the authority to add new categories of math errors administratively.

**PRESENT LAW**

Before the IRS may assess a deficiency, IRC § 6213(a) ordinarily requires that it send the taxpayer a "notice of deficiency" that gives the taxpayer 90 days (150 days if addressed to a taxpayer outside the United States) to contest it by filing a petition with the U.S. Tax Court (known as "deficiency procedures"). The taxpayer's ability to appeal a deficiency determination to the Tax Court before paying the tax is central to the taxpayer's *right to appeal an IRS decision in an independent forum*.<sup>1</sup>

As an exception to standard deficiency procedures, IRC § 6213(b)(1) authorizes the IRS to summarily assess and collect tax without first providing the taxpayer with a notice of deficiency or access to the Tax Court when addressing "mathematical and clerical" errors (known as "math error authority"). If a taxpayer contests a math error notice within 60 days, IRC § 6213(b)(2)(A) provides that the IRS must abate the assessment. If the IRS abates the assessment, it must follow deficiency procedures before it can reassess the tax. Taxpayers who do not contest a math error notice within 60 days lose the right to do so in court before paying. The IRS may summarily assess 22 types of mathematical or clerical errors, which are codified at IRC § 6213(g)(2) in subparagraphs A-V.

**REASONS FOR CHANGE**

Congress generally requires the IRS to follow deficiency procedures, which provide taxpayers with notice and a reasonable opportunity to challenge the IRS's tax adjustment. Math error authority, which provides fewer taxpayer protections, was authorized as a limited exception to regular deficiency procedures. It allows the IRS to make adjustments in cases of clear taxpayer error, such as where a taxpayer incorrectly adds numbers or incorrectly transcribes a number from one form to another. Because taxpayers have fewer protections under math error procedures, the procedures are not intended to be used where a substantive disagreement may exist. When Congress has expanded the IRS's math error authority, it has done so consistent with that principle.

<sup>1</sup> See IRC § 7803(a)(3)(E) (identifying the *right to appeal a decision of the Internal Revenue Service in an independent forum* as a taxpayer right).



Because math error procedures are cheaper and simpler for the IRS than deficiency procedures, the Department of the Treasury in the past has requested that Congress grant it the authority to add new categories of “correctable errors” by regulation.<sup>2</sup>

The National Taxpayer Advocate is concerned about the impact on taxpayer rights of giving the IRS broad authority to add new categories of math error. In our reports to Congress, we have documented numerous circumstances in which the IRS has used math error authority to address discrepancies that have undermined taxpayer rights.<sup>3</sup>

If the IRS uses math error authority to address more complex issues that require additional fact finding, its assessments are more likely to be wrong, and the IRS’s computer-generated notices, which confuse many taxpayers in the simplest of circumstances, are likely to become even more difficult to understand.<sup>4</sup> A recent example illustrates a significant omission on math error notices, where taxpayers’ Recovery Rebate Credits were adjusted. In 2021, the IRS issued about 6.5 million math error notices that omitted the 60-day time period language for requesting an abatement of the tax.<sup>5</sup> The IRS later reissued letters to these taxpayers informing them of their right to request an abatement and restarted the 60-day time period from the date of these new letters. Notably, the law does not require the IRS to tell taxpayers the assessment will become final if they fail to contest a math error adjustment within 60 days. As a result, taxpayers can lose their right to challenge the adjustments in court before paying, undermining the taxpayer’s *right to appeal an IRS decision in an independent forum*.

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- 2 See, e.g., Joint Committee on Taxation, JCS-1-19, Description of Certain Revenue Provisions Contained in the President’s Fiscal Year 2020 Budget Proposal 62, 64 (July 8, 2019); Department of the Treasury, General Explanations of the Administration’s Fiscal Year 2016 Revenue Proposals 245-246 (Feb. 2015).
  - 3 See, e.g., National Taxpayer Advocate 2018 Annual Report to Congress 164 (Most Serious Problem: *Post-Processing Math Error Authority: The IRS Has Failed to Exercise Self-Restraint in Its Use of Math Error Authority, Thereby Harming Taxpayers*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/07/ARC18\\_Volume1\\_MSP\\_11\\_PostProcessing.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/07/ARC18_Volume1_MSP_11_PostProcessing.pdf); National Taxpayer Advocate 2018 Annual Report to Congress 174 (Most Serious Problem: *Math Error Notices: Although the IRS Has Made Some Improvements, Math Error Notices Continue to Be Unclear and Confusing, Thereby Undermining Taxpayer Rights and Increasing Taxpayer Burden*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/07/ARC18\\_Volume1\\_MSP\\_12\\_MathError.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/07/ARC18_Volume1_MSP_12_MathError.pdf); National Taxpayer Advocate 2015 Annual Report to Congress 329-339 (Legislative Recommendation: *Math Error Authority: Authorize the IRS to Summarily Assess Math and “Correctable” Errors Only in Appropriate Circumstances*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC15\\_Volume1\\_LR\\_02\\_Math-Error-Authority.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC15_Volume1_LR_02_Math-Error-Authority.pdf); National Taxpayer Advocate 2014 Annual Report to Congress 163-171 (Most Serious Problem: *Math Error Notices: The IRS Does Not Clearly Explain Math Error Adjustments, Making It Difficult for Taxpayers to Understand and Exercise Their Rights*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2014-ARC\\_VOL-1\\_S1\\_MSP-16-508.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2014-ARC_VOL-1_S1_MSP-16-508.pdf); National Taxpayer Advocate 2013 Annual Report to Congress vol. 2, at 5 (*Do Accuracy-Related Penalties Improve Future Reporting Compliance by Schedule C Filers?*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2013-ARC\\_VOL-2-1.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2013-ARC_VOL-2-1.pdf); National Taxpayer Advocate 2013 Annual Report to Congress vol. 2, at 92-93, [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2013-ARC\\_VOL-2.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2013-ARC_VOL-2.pdf); National Taxpayer Advocate 2011 Annual Report to Congress 74-92 (*Expansion of Math Error Authority and Lack of Notice Clarity Create Unnecessary Burden and Jeopardize Taxpayer Rights*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2011-ARC\\_MSP-2-6.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2011-ARC_MSP-2-6.pdf); National Taxpayer Advocate 2006 Annual Report to Congress 311 (Most Serious Problem: *IRS Implementation of Math Error Authority Impairs Taxpayer Rights*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2006-arc\\_vol\\_1\\_cover\\_section\\_1.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2006-arc_vol_1_cover_section_1.pdf); National Taxpayer Advocate 2003 Annual Report to Congress 113 (Most Serious Problem: *Math Error Authority*), <https://www.taxpayeradvocate.irs.gov/reports/2003-annual-report-to-congress/full-report/>; National Taxpayer Advocate 2002 Annual Report to Congress 25 (Most Serious Problem: *Math Error Authority*), <https://www.taxpayeradvocate.irs.gov/reports/2002-annual-report-to-congress/full-report/>; National Taxpayer Advocate 2002 Annual Report to Congress 186 (Legislative Recommendation: *Math Error Authority*), <https://www.taxpayeradvocate.irs.gov/reports/2002-annual-report-to-congress/full-report/>; National Taxpayer Advocate 2001 Annual Report to Congress 33 (Most Serious Problem: *Explanations on Math Error Authority*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2001\\_tas.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2001_tas.pdf).
  - 4 Erin M. Collins, Math Error, Part I, NATIONAL TAXPAYER ADVOCATE BLOG (July 28, 2021), <https://www.taxpayeradvocate.irs.gov/news/nta-blog-math-error-part-i/>; Erin M. Collins, Math Error, Part II: Math Error Notices Aren’t Just Confusing; Millions of Notices Adjusting the Recovery Rebate Credit Also Omitted Critical Information, NATIONAL TAXPAYER ADVOCATE BLOG (Aug. 3, 2021), <https://www.taxpayeradvocate.irs.gov/news/nta-blog-math-error-part-ii-math-error-notices-arent-just-confusing-millions-of-notices-adjusting-the-recovery-rebate-credit-also-omitted-critical-information/>.
  - 5 Erin M. Collins, Math Error, Part II: Math Error Notices Aren’t Just Confusing; Millions of Notices Adjusting the Recovery Rebate Credit Also Omitted Critical Information, NATIONAL TAXPAYER ADVOCATE BLOG (Aug. 3, 2021), <https://www.taxpayeradvocate.irs.gov/news/nta-blog-math-error-part-ii-math-error-notices-arent-just-confusing-millions-of-notices-adjusting-the-recovery-rebate-credit-also-omitted-critical-information/>.



Math error authority may be appropriate to use where required schedules are omitted or annual or lifetime dollar caps have been exceeded. It also may be appropriate to use where there is a discrepancy between a return entry and data available to the IRS from a reliable government database, such as records maintained by the Social Security Administration. But the IRS should not be the arbiter of that reliability. Rather, Congress should retain full authority to determine whether the administrative “efficiency” of using math error authority in these instances outweighs the loss of the significant taxpayer protections that deficiency procedures provide.

## RECOMMENDATIONS

- Refrain from giving the IRS authority to add new categories of “correctable errors” by regulation. Because the deficiency procedures created by Congress provide important taxpayer protections, Congress should retain the sole authority to determine whether and when to create exceptions to deficiency procedures by adding categories of mathematical or clerical errors.
- Amend IRC § 6213(g) to authorize the IRS to exercise its existing (and any new) authority to summarily assess a deficiency due to “clerical errors” only where: (i) there is a discrepancy between a return entry and reliable government data; (ii) the IRS’s notice clearly describes the discrepancy and how to contest it; (iii) the IRS has researched all information in its possession that could help reconcile the discrepancy; (iv) the IRS does not have to evaluate documentation to make a determination; and (v) there is a low abatement rate for taxpayers who respond.
- Amend IRC § 6213(g) to provide that the IRS is not authorized to use any new criteria or data to make summary assessments unless the Department of the Treasury, in conjunction with the National Taxpayer Advocate, has evaluated and publicly reported on the reliability of the criteria or data for that intended use.<sup>6</sup>

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6 For a more limited recommendation, see National Taxpayer Advocate 2015 Annual Report to Congress 329-339 (Legislative Recommendation: *Math Error Authority: Authorize the IRS to Summarily Assess Math and “Correctable” Errors Only in Appropriate Circumstances*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC15\\_Volume1\\_LR\\_02\\_Math-Error-Authority.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC15_Volume1_LR_02_Math-Error-Authority.pdf).

**Legislative Recommendation #9**

## **Require Independent Managerial Review and Written Approval Before the IRS May Assert Multiyear Bans Barring Taxpayers From Receiving Certain Tax Credits and Clarify That the Tax Court Has Jurisdiction to Review the Assertion of Multiyear Bans**

**SUMMARY**

- *Problem:* Refundable credits, including the Earned Income Tax Credit (EITC) and the Child Tax Credit (CTC), can be a lifeline for many low-income families, accounting for a high percentage of their household incomes. To deter improper claims, the law requires the IRS to ban taxpayers who make improper claims from receiving these credits in future years under certain circumstances – even if the taxpayers otherwise meet all eligibility requirements in those future years. Because a multiyear ban against receiving these tax credits can have financially devastating consequences, it is critical that there be adequate administrative and judicial safeguards to ensure they are only imposed in appropriate cases.
- *Solution:* Require IRS managerial approval of multiyear bans and clarify that the Tax Court has jurisdiction to review the imposition of a ban in a proceeding for the years in which the ban is imposed.

**PRESENT LAW**

IRC §§ 24(g), 25A(b), and 32(k) require the IRS to ban a taxpayer from claiming CTC, the Credit for Other Dependents (ODC), the American Opportunity Tax Credit (AOTC), and EITC for two years if the IRS makes a final determination that the taxpayer improperly claimed the credit with reckless or intentional disregard of rules and regulations. The duration of the ban increases to ten years if the IRS makes a final determination that the credit was claimed fraudulently. These sections refer to the years in which the ban is imposed as the “disallowance period.”<sup>1</sup>

IRC § 6214 grants the Tax Court jurisdiction to redetermine a deficiency for the tax year(s) before the court, but it does not grant the Tax Court jurisdiction to redetermine deficiencies for other tax years.

**REASONS FOR CHANGE**

Congress directed the IRS to impose multiyear bans on CTC, ODC, AOTC, and EITC eligibility to deter and penalize certain taxpayers who improperly claim these credits. These multiyear bans are unique in tax law because they prevent taxpayers from receiving credits in future years, even if they otherwise satisfy all eligibility requirements in those years.

Refundable credits can be a lifeline for low-income taxpayers, so it is critical that there be adequate safeguards to ensure both that the IRS imposes a ban only when a taxpayer acts with the requisite improper intent and that a taxpayer has access to meaningful judicial review of an IRS ban determination. A 2019 TAS study found that, on average, EITC accounted for more than 20 percent of eligible taxpayers’ adjusted gross incomes.

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<sup>1</sup> IRC §§ 24(g)(1)(A), 25A(b)(4)(A), 32(k)(1)(B).

## Written Managerial Approval

In most ban cases, IRS procedures require a manager to review the case independently and approve the assertion of a ban in writing.<sup>2</sup> However, the IRS's internal rules allow the agency to impose two-year bans automatically in some EITC cases,<sup>3</sup> and it recently expanded its practice of automatically imposing bans to include the refundable portion of the CTC (referred to as the Additional Child Tax Credit, or ACTC).<sup>4</sup> Moreover, two TAS research studies of two-year ban cases found that managerial approval, even where required, is usually lacking.<sup>5</sup> The IRS also may change its policy of requiring managerial approval at any time.

The National Taxpayer Advocate does not believe that multiyear bans should ever be imposed by automatic or systemic means. The law provides for imposition of the two-year ban only in cases where the IRS determines a taxpayer acted recklessly or with intentional disregard of rules and regulations, and it provides for imposition of the ten-year ban only in cases where the IRS determines a taxpayer's claim was fraudulent. Notably, the law does not permit the IRS to impose multiyear bans when an improper claim is due to inadvertent error, *or even due to negligence*.

A computer is not capable of assessing a taxpayer's state of mind and therefore cannot determine whether an improper claim was due to reckless or intentional disregard of rules and regulations (as opposed to inadvertent error or negligence). This determination requires an independent facts-and-circumstances investigation by an employee. In light of the potentially harsh financial impact of multiyear bans, managerial approval should be required in all cases before they are imposed.

## Tax Court Jurisdiction

Although a taxpayer should be able to obtain independent Tax Court review of a multiyear ban, it is not clear whether, or when, the Tax Court has the jurisdiction to reverse a multiyear ban. That is because the imposition of a ban and the effect of a ban on a taxpayer's tax liability occur in different tax years.

The Tax Court may not have jurisdiction to reverse a ban in the year it is imposed. IRC § 6214 generally limits the Tax Court to determining the amount of tax owed in the tax year(s) before the court. By its nature, a ban against claiming tax credits in future years will affect the taxpayer's tax liability in future years – not in the year in which it is imposed.<sup>6</sup>

The Tax Court also may lack jurisdiction to reverse a ban in the years in which the ban is in effect. By operation of law, a ban automatically denies benefits in future years. If a taxpayer challenges the IRS's deficiency determination in a year in which the ban denies tax credits, the year in which the ban was initially imposed generally will not be before the court. It is not clear whether the court may reach back to the earlier year to determine if the ban was properly imposed.

2 Internal Revenue Manual (IRM) 4.19.14.7.1(2), 2/10 Year Ban – Correspondence Guidelines for Examination Technicians (CET) (Apr. 15, 2021).

3 IRM 4.19.14.7.1.5, Project Codes 0027 and 0028 – EITC Recertification with a Proposed 2 Year EITC Ban (Dec. 16, 2020).

4 The American Rescue Plan Act, Pub. L. No. 117-2, § 9611, 135 Stat. 4, 359-376 (2021), makes the CTC fully refundable for tax year 2021. See Treasury Inspector General for Tax Administration, Ref. No. 2021-40-036, *Improper Payment Rates for Refundable Tax Credits Remain High* 8 (2021) (reporting that “IRS management stated that, starting in Processing Year 2021, systemic processes will assess the two-year ban for the ACTC.”).

5 See National Taxpayer Advocate 2019 Annual Report to Congress vol. 2, at 239-256 (Research Study: *Study of Two-Year Bans on the Earned Income Tax Credit, Child Tax Credit, and American Opportunity Tax Credit*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC19\\_Volume1\\_TRRS\\_02\\_EITCban.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC19_Volume1_TRRS_02_EITCban.pdf); National Taxpayer Advocate 2013 Annual Report to Congress 103-115 (Most Serious Problem: *Earned Income Tax Credit: The IRS Inappropriately Bans Many Taxpayers From Claiming EITC*) [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2013-ARC\\_VOL-1\\_S1-MSP-9.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2013-ARC_VOL-1_S1-MSP-9.pdf).

6 Compare *Garcia v. Comm’r*, T.C. Summ. Op. 2013-28 (holding, in a nonprecedential case, that a ban did not apply), with *Ballard v. Comm’r*, No. 3843-15S (T.C. Feb. 12, 2016) (declining to rule on the application of IRC § 32(k), noting that the application of the ban had no effect on the taxpayer's federal income tax liability for the year before it).

Transparency is a critical element of taxpayer rights and fairness, and taxpayers should understand clearly when they may seek Tax Court review of an adverse IRS determination. In most cases, the law is clear. Here, the law is not clear, and there appear to be four possible outcomes: (i) the Tax Court may have jurisdiction to review a ban both for the year in which it is imposed and for the year in which it is effective; (ii) the Tax Court may have jurisdiction to review a ban for the year in which it is imposed but not for the year in which it is effective; (iii) the Tax Court may not have jurisdiction to review a ban for the year in which it is imposed but may have jurisdiction to review it for the year in which it is effective; or (iv) the Tax Court may not have jurisdiction to review a ban at any time. These procedural uncertainties undermine the taxpayer's *rights to appeal an IRS decision in an independent forum* and *to a fair and just tax system* and require clarification.

In general, the Tax Court's jurisdiction to adjust CTC, ODC, AOTC, or EITC claims is based on its deficiency jurisdiction.<sup>7</sup> As noted above, the determination to subject a taxpayer to a multiyear ban does not itself create a deficiency in the current tax year. Therefore, the National Taxpayer Advocate recommends that Congress amend IRC § 6214 to grant the Tax Court jurisdiction to determine whether the ban was properly imposed during a proceeding concerning a year in the disallowance period involving a deficiency created by the imposition of the ban (*i.e.*, during the two years in which the credits are denied rather than the initial year in which the ban was imposed).

## RECOMMENDATIONS

- Amend IRC §§ 24(g), 25A(b), and 32(k) to require independent managerial review and written approval based on consideration of all relevant facts and circumstances before the IRS may assert a multiyear ban.<sup>8</sup>
- Amend IRC § 6214 to grant the Tax Court jurisdiction (i) to review the IRS's final determination to impose a multiyear ban under IRC §§ 24(g), 25A(b), or 32(k) in any proceeding before the Tax Court involving the years included in the disallowance period in which the notice of deficiency disallows CTC, ODC, AOTC, or EITC on the basis of a multiyear ban and (ii) to allow the affected credit if it finds a multiyear ban was improperly imposed and the taxpayer otherwise qualifies for the credit.

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<sup>7</sup> IRC §§ 6213-6214.

<sup>8</sup> The National Taxpayer Advocate is not proposing to amend IRC § 6751(b) because determinations made by electronic means are exempt from the requirement of supervisory approval under IRC § 6751(b)(2)(B). As discussed above, the determination of the application of a multiyear ban should not be determined electronically and should be reviewed and approved by the supervisor of the employee who makes the determination.

**Legislative Recommendation #10****Allow Additional Time for Taxpayers to Request Abatement of a Math Error Assessment Equal to the Additional Time Allowed to Respond to a Notice of Deficiency When the Math Error Notice Is Addressed to a Person Outside the United States****SUMMARY**

- *Problem:* U.S. taxpayers living abroad generally need more time to respond to IRS notices than taxpayers living within the United States. The tax code gives taxpayers living abroad an additional 60 days to respond to a notice of deficiency, but it does not give taxpayers living abroad additional time to respond to a math error notice – even though failure to respond to a math error notice within 60 days means the IRS may assess the tax and the taxpayer forfeits the right to challenge the IRS's assessment in the U.S. Tax Court.
- *Solution:* Give taxpayers living abroad an additional 60 days to respond to math error notices.

**PRESENT LAW**

IRC § 6213(b) authorizes the IRS to make a “summary assessment” of tax arising from mathematical or clerical errors as defined in IRC § 6213(g), thus bypassing otherwise applicable deficiency procedures. A taxpayer has no right to file a petition in the U.S. Tax Court based on a math error notice. Under IRC § 6213(b)(2)(A), however, a taxpayer has 60 days after a math error notice is sent to request abatement. If the taxpayer makes an abatement request within 60 days, the IRS must abate the summary assessment and then follow deficiency procedures under IRC § 6212 if it wishes to reassess an increase in tax. If the taxpayer does not submit an abatement request within 60 days, the taxpayer forfeits his or her right to file a petition in the Tax Court. No additional time beyond the 60 days is allowed to request an abatement when the math error notice is addressed to a taxpayer outside the United States.

By contrast, a taxpayer outside the United States who receives a notice of deficiency is given additional time to respond. In general, a taxpayer may file a petition in the Tax Court for a redetermination of a deficiency within 90 days from the date the notice is mailed. However, when the notice of deficiency “is addressed to a person outside the United States,” IRC § 6213(a) provides that the taxpayer has 150 days from the date the notice is mailed to file a Tax Court petition. The Tax Court has construed this language broadly, concluding among other things that the 150-day period for filing a petition applies not only when a notice of deficiency is mailed to an address outside the United States but also when a notice of deficiency is mailed to an address within the United States, provided the taxpayer is located outside the United States.<sup>1</sup>

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<sup>1</sup> See, e.g., *Levy v. Comm’r*, 76 T.C. 228 (1981) (holding that the 150-day rule is applicable to a U.S. resident who is temporarily outside the country when the notice is mailed and delivered); *Looper v. Comm’r*, 73 T.C. 690 (1980) (holding that the 150-day rule is applicable where a notice is mailed to an address outside the United States); *Lewy v. Comm’r*, 68 T.C. 779 (1977) (holding that the 150-day rule is applicable to a foreign resident who is in the United States when the notice is mailed but is outside the United States when the notice is delivered); *Hamilton v. Comm’r*, 13 T.C. 747 (1949) (holding that the 150-day rule is applicable to a foreign resident who is outside the United States when the notice is mailed and delivered).

## REASONS FOR CHANGE

An estimated nine million U.S. citizens live abroad as well as about 228,000 U.S. military service personnel.<sup>2</sup> In addition, more than 340,000 U.S. students study overseas.<sup>3</sup> Taxpayers living abroad (temporarily or permanently) often require more time to respond to IRS notices than taxpayers living in the United States. Mail delivery takes longer in both directions – in some cases, depending on where the taxpayer is located, substantially longer. In addition, persons temporarily abroad often do not have access to their tax or financial records, making it difficult for them to respond immediately.

By giving taxpayers living abroad 60 additional days to file a petition in the Tax Court in response to a notice of deficiency, Congress recognized that holding overseas taxpayers to the same deadlines as taxpayers located in the United States would be unreasonable. The same logic applies with respect to math error notices. In fact, the need for additional time is arguably greater in the case of math error notices because the standard response deadline is 60 days (as opposed to 90 days for filing a Tax Court petition in response to a notice of deficiency).

## RECOMMENDATION

- Amend IRC § 6213(b)(2)(A) to allow taxpayers 120 days to request an abatement of tax when a math error notice is addressed to a person outside the United States.

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2 For fiscal year (FY) 2019, the Department of State estimates that about nine million U.S. citizens lived abroad. U.S. Department of State, Bureau of Consular Affairs, Consular Affairs by the Numbers, FY 2019 data (Jan. 2020), <https://travel.state.gov/content/dam/travel/CA-By-the-Number-2020.pdf>. As of June 30, 2021, about 228,000 U.S. military service personnel were stationed abroad, including military reserve personnel and Department of Defense civilian employees. U.S. Department of Defense, Defense Manpower Data Center (DMDC), Military and Civilian Personnel by Service/Agency by State/Country (June 30, 2021), <https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/workforce-reports>.

3 Open Doors, U.S. Study Abroad: All Destinations, <https://opendoorsdata.org/data/us-study-abroad/all-destinations> (last visited Sept. 2, 2020) (showing 341,751 U.S. students studied abroad during the 2017-2018 academic year).

**Legislative Recommendation #11****Provide That Assessable Penalties Are Subject to Deficiency Procedures****SUMMARY**

- *Problem:* To judicially challenge “assessable penalties,” a taxpayer must pay the penalty in full and then bring suit in a U.S. district court or the U.S. Court of Federal Claims. The inability of taxpayers to obtain judicial review on a pre-assessment basis and the requirement that taxpayers pay the penalties in full to obtain judicial review on a post-assessment basis can effectively deprive taxpayers of the right to judicial review at all.
- *Solution:* Give taxpayers an opportunity to challenge assessable penalties in the U.S. Tax Court prior to assessment by making these penalties subject to the deficiency procedures.

**PRESENT LAW**

IRC § 6212 requires the IRS to issue a “notice of deficiency” before assessing certain liabilities. When the IRS issues a notice of deficiency, IRC § 6213 authorizes the taxpayer to petition the U.S. Tax Court within 90 days (or 150 days for notices addressed to a person outside the United States) to review the IRS determination as stated in the notice.

IRC § 6671(a) authorizes the IRS to assess some penalties without first issuing a notice of deficiency.<sup>1</sup> These penalties are generally subject to judicial review only if taxpayers first pay the penalties and then incur the costs of filing suit in a U.S. district court or the Court of Federal Claims to recover the payments.<sup>2</sup> The district courts and the Court of Federal Claims impose higher court fees than the U.S. Tax Court, and due to the complexities of their rules, taxpayers usually have to retain an attorney to dispute the assessment.

In addition, some assessable penalties are subject to the “full payment rule.” In *Flora v. United States*, 362 U.S. 145 (1960), the U.S. Supreme Court held that, with limited exceptions, a taxpayer must have fully paid the assessment before filing suit in a U.S. district court or the Court of Federal Claims. One exception to the full payment rule applies to “divisible” taxes. In the case of divisible taxes, a taxpayer may pay only a fraction of the tax and judicially challenge the penalty. These penalties include the trust fund recovery penalty under IRC § 6672(a).

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<sup>1</sup> These “assessable” penalties are generally those that are due and payable upon notice and demand. Unlike penalties subject to deficiency procedures, assessable penalties carry no rights to a 30-day letter, agreement form, or notice requirements prior to assessment. Internal Revenue Manual 20.1.9.1.5, Common Terms and Acronyms (Jan. 29, 2021).

<sup>2</sup> See IRC § 7422 for requirements relating to refund suits.



By contrast, other assessable penalties require the taxpayer to pay in full to obtain judicial review. These penalties include foreign information reporting penalties under IRC §§ 6038, 6038A, 6038B, 6038C, and 6038D,<sup>3</sup> and penalties with respect to reportable transactions under IRC §§ 6707 and 6707A.<sup>4</sup> Penalties under these sections can be substantial.<sup>5</sup>

## REASONS FOR CHANGE

Taxpayers who are savvy enough to request an abatement based on reasonable cause or to request a conference with the IRS Independent Office of Appeals frequently obtain relief from assessable penalties, particularly where the IRS imposes a penalty systemically (rather than imposing it manually during an audit). TAS has previously reported that the IRS abated between 71 percent and 88 percent of dollars systemically assessed under IRC §§ 6038 and 6038A.<sup>6</sup> Specifying that deficiency procedures apply would prevent the systemic assessments the IRS so often abates, a process that unnecessarily consumes resources for the IRS and imposes undue burdens on taxpayers. Given how substantially these penalties can add up, requiring full payment puts judicial review out of reach for many if not most taxpayers. It is unconscionable to require taxpayers to pay penalties that can run into the millions of dollars without first giving taxpayers an opportunity to obtain judicial review of the IRS's determination. This is particularly important for taxpayers who face large penalties but have limited resources.

Providing that assessable penalties are subject to deficiency procedures would put pre-assessment judicial review of penalties in the hands of the Tax Court. In our view, that is where it belongs. Due to the tax expertise of its judges, the Tax Court is often better equipped to consider tax controversies than other courts. It is also more accessible to less knowledgeable and unrepresented taxpayers than other courts because it uses informal procedures, particularly in disputes that do not exceed \$50,000. Another benefit is that taxpayers are generally offered the option of receiving free legal assistance from a Low Income Taxpayer Clinic or *pro bono* representative. In most instances, the Tax Court is the least expensive and easiest-to-navigate judicial forum for low-income taxpayers.

- 3 Although IRC § 6671(a) specifically references only the “penalties and liabilities provided by this subchapter” (i.e., IRC Chapter 68, Subchapter B), the IRS takes the position that various international information reporting penalties in Chapter 61 are also immediately assessable without the issuance of a notice of deficiency, including the penalty under IRC § 6038 for failure to file Form 5471, Information Return of U.S. Persons With Respect to Certain Foreign Corporations. See IRC §§ 6201(a); 7806(b). This position has also been accepted by some federal courts at least as to IRC § 6038. See *Deweese v. U.S.*, 272 F.Supp.3d 96 (D.D.C. 2017), *aff’d without published opinion*, 767 Fed.Appx. 4 (D.C. Cir. 2019), *cert. denied*, 140 S.Ct. 48 (2019) (holding that the failure to offer a preassessment opportunity for judicial review of a penalty under IRC § 6038 did not violate due process under the Fifth Amendment); *Wheaton v. U.S.*, 888 F.Supp. 622 (D.N.J. 1995) (holding the IRC § 6038 penalty was not subject to deficiency procedures). *Wheaton* also holds that IRC § 6038 penalties are subject to the *Flora* full payment rule. 888 F.Supp. at 627. See also *Gaynor v. U.S.*, 150 Fed. Cl. 519 (2020) (holding that a refund suit to challenge IRC § 6038 penalty for failure to file Form 5471 is subject to the full payment rule of *Flora*).
- 4 Courts ruled that full payment was required prior to a judicial challenge of the IRC § 6707 penalty in *Pfaff v. U.S.*, No. 14-cv-03349, 2016 WL 915738 (D. Colo. Mar. 10, 2016) and *Diversified Group v. U.S.*, 841 F.3d 975 (Fed. Cir. 2016).
- 5 The penalty under IRC § 6038 for failure to file Form 5471 with respect to certain foreign corporations and partnerships is \$10,000 for each accounting period for each failure to file Form 5471 with respect to certain foreign corporations and partnerships. IRC § 6038(b). An additional “continuation penalty” of up to \$50,000 can be added to each penalty if the failure continues for more than 90 days after the IRS sends notice of the failure. IRC § 6038(b)(2). The IRC § 6038 penalty in *Gaynor* totaled \$120,000. *Gaynor*, 150 Fed.Cl. at 525, 527. The amount of the IRC § 6707 penalty is \$50,000 for failure to furnish information regarding reportable transactions, other than listed transactions. IRC § 6707(b)(1). If the penalty is with respect to a listed transaction, the amount of the penalty is the greater of the following: \$200,000, or 50 percent of the gross income derived by the material advisor with respect to aid, assistance, or advice which is provided before the date the information return is filed under IRC § 6111. IRC § 6707(b)(2). In *Diversified*, the penalties assessed under IRC § 6707 for failure to register their tax shelter totaled \$24.9 million. *Diversified Grp., Inc. v. U.S.*, 123 Fed. Cl. 442, 445 (2015), *aff’d*, 841 F.3d 975 (Fed. Cir. 2016).
- 6 See National Taxpayer Advocate 2020 Annual Report to Congress 119, 124-125 (Most Serious Problem: *International: The IRS’s Assessment of International Penalties Under IRC §§ 6038 and 6038A Is Not Supported by Statute, and Systemic Assessments Burden Both Taxpayers and the IRS*) (reporting that when penalties under IRC §§ 6038 and 6038A were applied systemically, the abatement percentage measured by number of penalties ranged from 55 to 72 percent and the abatement percentage measured by dollar value of penalties ranged from 71 to 88 percent in fiscal year 2020), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20\\_MSP\\_08\\_International.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20_MSP_08_International.pdf). The IRS abated manual assessments at rates ranging from 17 percent to 39 percent by number and from eight percent to 66 percent by dollar value.

The National Taxpayer Advocate does not agree with the IRS's legal position that foreign information reporting penalties in Chapter 61 may be assessed without the issuance of a notice of deficiency under current law.<sup>7</sup> In light of the IRS's position, however, we believe Congress should clarify the point through legislation.

## RECOMMENDATION

- Amend IRC § 6212 to require the IRS to issue a notice of deficiency before assessing any “assessable penalty.”

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<sup>7</sup> See National Taxpayer Advocate 2020 Annual Report to Congress 119-131 (Most Serious Problem: *International: The IRS's Assessment of International Penalties Under IRC §§ 6038 and 6038A Is Not Supported by Statute, and Systemic Assessments Burden Both Taxpayers and the IRS*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20\\_MSP\\_08\\_International.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20_MSP_08_International.pdf).

**Legislative Recommendation #12****Direct the IRS to Implement an Automated Formula to Identify Taxpayers at Risk of Economic Hardship****SUMMARY**

- *Problem:* The tax code contains provisions designed to shield taxpayers experiencing economic hardship from IRS collection action, yet the IRS routinely enters into installment agreements (IAs) with taxpayers without undertaking the financial analysis required to determine whether the taxpayers can afford to make payments. Some anxious or intimidated taxpayers seek to resolve their liabilities quickly and do not know the IRS is required to halt collection action if they are in economic hardship. As a result, taxpayers often agree to make tax payments they cannot afford, leaving them unable to pay for basic necessities like food, shelter, and health care for themselves and their families.
- *Solution:* Direct the IRS to implement an algorithm, similar to one developed by TAS, to identify taxpayers at high risk of economic hardship and advise these taxpayers, before they enter into installment agreements, that they may not have to make current payments if they can document their hardship.

**PRESENT LAW**

The IRC contains several provisions that protect taxpayers experiencing economic hardship from IRS collection actions. IRC § 6330 authorizes a taxpayer in a collection due process hearing to propose collection alternatives, which may be based on an inability to pay the tax due to economic hardship.

IRC § 6343 requires the IRS to release a levy if the IRS determines that the levy “is creating an economic hardship due to the financial condition of the taxpayer.” Under Treas. Reg § 301.6343-1 and the Internal Revenue Manual, economic hardship exists when an individual is “unable to pay his or her reasonable basic living expenses.”

IRC § 7122(d) requires the IRS to develop and publish schedules of national and local allowances (known as allowable living expenses or ALEs) to ensure that taxpayers entering into offers in compromise are left with “an adequate means to provide for basic living expenses.”

**REASONS FOR CHANGE**

In general, the IRS is required to halt collection actions if a taxpayer demonstrates that he or she is in economic hardship. However, the IRS routinely enters into IAs with taxpayers without undertaking the financial analysis required to make a hardship determination. For example, taxpayers are not required to submit any financial information to qualify for streamlined IAs and may enter into them online without interacting with an IRS employee. While this is convenient and an unintrusive collection alternative for many taxpayers, it is not necessarily good for all taxpayers. Many anxious or intimidated taxpayers seek to resolve their liabilities quickly and do not know the IRS is required to halt collection action if they are in economic hardship. As a result, taxpayers often agree to make tax payments they cannot afford.

TAS estimates that about 27 percent of taxpayers who entered into streamlined IAs through the IRS's Automated Collection System (ACS) in fiscal year (FY) 2022 had incomes at or below their ALEs.<sup>1</sup> To emphasize the point: More than a quarter of taxpayers who agreed to streamlined IAs in ACS would have received the benefit of collection alternatives, such as offers in compromise or currently not collectible hardship (CNC-Hardship) status, if they had known to call the IRS to explain their financial circumstances.

That is not a fair result. Whether a taxpayer is left with sufficient funds to pay basic living expenses for himself and his family should not depend on the taxpayer's knowledge of the IRS's procedural rules.

Furthermore, taxpayers with incomes below their ALEs who paid their liabilities are disproportionately likely to have incurred economic hardship to do so. Some of these taxpayers will default on their IAs, which subjects them to additional collection actions and further increases their burden.

To address this problem, the TAS Research function has developed an automated algorithm that we believe can, with a high degree of accuracy, identify taxpayers whose incomes are below their ALEs. If the IRS validates this formula or develops an alternative formula that is reasonably accurate, it could place a "low-income" indicator on the accounts of all taxpayers whom the formula identifies as having incomes below their ALEs.<sup>2</sup>

While the ALE standards represent only average expenses for taxpayers and should not be used to automatically close a case as CNC-Hardship, an ALE-based indicator would be a useful starting point for financial analysis in the collection context. It could be used to alert collection employees speaking with a taxpayer over the phone of the need to request additional financial information so the IRS can analyze the specific facts and circumstances of the taxpayer's case. The indicator could be used to trigger a notification to taxpayers entering into online IAs that informs them of their right to contact the IRS collection function for assistance if they believe they cannot pay their tax debts without incurring economic hardship. The IRS could also use this algorithm to screen out these taxpayers from automated collection treatments such as the Federal Payment Levy Program, selection for referral to private collection agencies, or passport certification, unless and until the IRS has made direct personal contact with the taxpayer to verify his or her financial information.

In short, an automated economic hardship screen would benefit taxpayers and the IRS alike. It would help protect low-income taxpayers from agreeing to make payments that would leave them without adequate means to pay their basic living expenses, and it would help the IRS avoid the rework that occurs when taxpayers default on IAs they cannot afford.

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1 In FY 2018, TAS estimated that 39 percent of ACS taxpayers who entered into streamlined IAs had incomes at or below their ALEs. This estimate allowed two-vehicle ownership expenses for married taxpayers filing joint returns. TAS published a study on the feasibility of using an algorithm to identify taxpayers at risk of economic hardship in the National Taxpayer Advocate 2020 Annual Report to Congress. This study used a more conservative estimate of ALEs, allowing only one-vehicle ownership expense. See National Taxpayer Advocate 2020 Annual Report to Congress 249-267 (TAS Research Study: *The IRS Can Systemically Identify Taxpayers at Risk of Economic Hardship and Screen Them Before They Enter Into Installment Agreements They Cannot Afford*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20\\_TRRS\\_EconomicHardship.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20_TRRS_EconomicHardship.pdf).

2 In 2018, in response to legislation that directed the IRS to waive or reimburse IA user fees for taxpayers with adjusted gross incomes at or below 250 percent of the Federal Poverty Level, the IRS developed a "Low Income Indicator" (LII). To date, however, the IRS uses the LII solely to determine user fees – not to determine a taxpayer's eligibility for collection alternatives. In addition, although the legislation directed the IRS to determine adjusted gross income for "the most recent year for which such information is available," the IRS is making the determination solely on the basis of the taxpayer's most recent filed return, even if the taxpayer has not filed a return, or even had a filing requirement, in recent years. Where no return has been filed within the past two years, we recommend the IRS utilize information reporting data (e.g., Forms W-2 and 1099) to make the determination.

**RECOMMENDATION**

- Direct the IRS to implement an algorithm that will enable it to (i) identify taxpayers at high risk of economic hardship; (ii) respond appropriately to taxpayers who contact the IRS regarding a balance due; (iii) alert taxpayers at risk of economic hardship who seek to enter into streamlined IAs online of the resources available to them; (iv) determine whether to exclude taxpayers' debts from automated collection treatments such as the Federal Payment Levy Program, the private debt collection program, and passport certification; and (v) possibly rank cases for collection priority.

**Legislative Recommendation #13****Provide That “an Opportunity to Dispute” an Underlying Liability Means an Opportunity to Dispute Such Liability in the U.S. Tax Court****SUMMARY**

- *Problem:* The IRS takes collection actions against some taxpayers who did not have an opportunity to challenge the existence or amount of their tax liability in the U.S. Tax Court. As a result, some taxpayers have no alternative but to pay the tax the IRS says they owe and then seek a refund in a different federal court, an option that many taxpayers cannot afford and that imposes additional burden.
- *Solution:* Allow taxpayers to raise challenges to the existence or amount of an IRS-determined tax liability at a “Collection Due Process” (CDP) hearing in cases where they did not have a prior opportunity to dispute the liability in the U.S. Tax Court.

**PRESENT LAW**

IRC §§ 6320(b) and 6330(b) provide taxpayers with the right to request an independent review of a Notice of Federal Tax Lien filed by the IRS or a proposed levy action. This review is provided through a CDP hearing conducted by the IRS Independent Office of Appeals (Appeals) and is subject to review by the U.S. Tax Court, generally the only pre-payment judicial forum in which taxpayers may resolve their disputes with the IRS. Commonly, the existence of a tax liability has been conclusively determined by this point under procedures that gave the taxpayer an opportunity to seek U.S. Tax Court review of the IRS’s determination. Thus, the purpose of the CDP hearing typically is to determine whether the taxpayer qualifies for collection alternatives (*e.g.*, an offer in compromise or a partial-payment installment agreement) based on inability to pay.

However, IRC § 6330(c)(2)(B) also provides that a taxpayer may dispute the existence or amount of the underlying tax liability at a CDP hearing if the taxpayer “did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.”<sup>1</sup>

The IRS and the courts interpret IRC § 6330(c)(2)(B) and the Treasury regulations under IRC §§ 6320 and 6330 restrictively. They take the position that a taxpayer does not have a right to dispute the existence or amount of a liability if the taxpayer had a prior opportunity for a conference with Appeals, even if the taxpayer had no prior opportunity for U.S. Tax Court review of the liability and even if no subsequent U.S. Tax Court review of the Appeals determination is available.<sup>2</sup> For example, one court recently held that a taxpayer who did not receive a notice of deficiency was not permitted to dispute his underlying liability in a CDP hearing because the taxpayer previously sought to resolve the tax liability through audit reconsideration.<sup>3</sup> Because the underlying liability was not at issue in the CDP hearing, the taxpayer was precluded from disputing the underlying liability in the Tax Court proceeding.<sup>4</sup>

1 IRC §§ 6320(c), 6330(c)(2)(B). The phrase “underlying tax liability” includes the tax deficiency, any penalties and additions to tax, and statutory interest. *Katz v. Comm’r*, 115 T.C. 329, 339 (2000).

2 See Treas. Reg. §§ 301.6320-1(e)(3), Q&A (E2), 301.6330-1(e)(3), Q&A (E2) (2006); *Lewis v. Comm’r*, 128 T.C. 48, 61 (2007); *James v. Comm’r*, 850 F.3d 160 (4th Cir. 2017); *Keller Tank Servs. II v. Comm’r*, 854 F.3d 1178 (10th Cir. 2017); *Our Country Home Enters. v. Comm’r*, 855 F.3d 773 (7th Cir. 2017). Additionally, at least one Court of Appeals has held that IRC § 6330(c)(4)(A) provides an independent basis for denying a merits hearing in the CDP process if a prior merits hearing occurred. *James*, 850 F.3d 160.

3 *Lander v. Comm’r*, 154 T.C. 104 (2020). Audit reconsiderations are not subject to U.S. Tax Court review.

4 See Treas. Reg. § 301.6330-1(f)(2), Q&A (F)(3).

Mere notification of the right to request an Appeals conference may prevent the taxpayer from disputing the tax liability in a CDP hearing. For example, the IRS assesses some penalties without issuing a notice of deficiency.<sup>5</sup> The IRS notifies the taxpayer of the proposed penalty by sending a letter or notice. Whether or not the taxpayer requests or receives a conference with Appeals in response to the letter, the taxpayer will not be permitted to dispute the merits of the liability at a CDP hearing or in the U.S. Tax Court. To obtain judicial review of the underlying liability, the taxpayer must pay the tax – generally the full amount due – and seek a refund in a federal district court or the U.S. Court of Federal Claims.<sup>6</sup>

## REASONS FOR CHANGE

The value of CDP proceedings is undermined when taxpayers who have never had an opportunity to dispute their underlying liability in the U.S. Tax Court are precluded from doing so during their CDP hearing, and these taxpayers have no alternative but to pay the tax and then seek a refund, an option that not all taxpayers can afford. The National Taxpayer Advocate believes that judicial and administrative interpretations limiting a taxpayer's ability to challenge the IRS's liability determination in a CDP hearing are inconsistent with Congress's intent when it enacted CDP procedures. Compared to the burden the current rules place on taxpayers, allowing more taxpayers to dispute their tax liabilities in CDP hearings will better protect taxpayer rights without imposing undue administrative burden on the IRS or the Tax Court.

## RECOMMENDATIONS

- Amend IRC § 6330(c)(2)(B) to allow taxpayers to raise challenges to the existence or amount of the underlying tax liability at a CDP hearing for any tax period if the taxpayer did not receive a valid notice of deficiency for such liability, or in a non-deficiency case, the taxpayer did not have an opportunity to dispute the liability in the U.S. Tax Court.
- Clarify that IRC § 6330(c)(4)(A) applies only to collection issues and not to liability issues, which are addressed exclusively in IRC § 6330(c)(2)(B).

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5 These "assessable" penalties are primarily found in IRC §§ 6671 through 6720C. The IRS sometimes assesses these penalties systemically (i.e., automatically by computer rather than manually during an audit). See, e.g., Internal Revenue Manual 21.8.2.20.2(1), Form 5471 Penalties Systemically Assessed From Late-Filed Form 1120 Series or Form 1065 (Feb. 4, 2022).

6 Under *Flora v. United States*, 362 U.S. 145 (1960), a taxpayer must have "fully paid" the assessment before filing a refund suit. One exception to the full payment rule applies to "divisible" taxes.



**Legislative Recommendation #14****Prohibit Offset of the Earned Income Tax Credit (EITC) Portion of a Tax Refund to Past-Due Federal Tax Liabilities****SUMMARY**

- *Problem:* The IRS has discretion to not offset tax refunds to satisfy outstanding federal tax liabilities, but it has not exercised that discretion with respect to Earned Income Tax Credit (EITC) refunds. Reducing the amount of EITC a taxpayer is eligible to receive by withholding a tax refund undermines the purpose of this anti-poverty program.
- *Solution:* Prohibit the IRS from offsetting the EITC portion of a taxpayer's refund to satisfy prior-year tax liabilities.

**PRESENT LAW**

IRC § 6402(a) generally authorizes the IRS to offset (*i.e.*, withhold) a taxpayer's refund and apply it to satisfy a prior-year federal tax liability, but it does not require the IRS to do so.<sup>1</sup> If a taxpayer can demonstrate that he/she will experience an economic hardship if the IRS offsets his/her refund, the IRS sometimes will “bypass” the offset (*i.e.*, pay the refund). This is referred to as an “offset bypass refund” (OBR).<sup>2</sup> Similarly, the IRS paid refunds generated by Recovery Rebate Credits (RRCs) enacted during the COVID-19 pandemic without reduction to satisfy a tax debt.<sup>3</sup>

The EITC is a refundable credit for low-income working individuals and families.<sup>4</sup> The EITC is claimed on a tax return and is included in the computations that determine whether a taxpayer is entitled to receive a refund and, if so, the amount of the refund.

The Debt Collection Improvement Act of 1996 (DCIA) requires federal agencies to offset certain federal payments to collect outstanding non-tax debts owed to the United States.<sup>5</sup> However, the amount subject to offset is statutorily limited in some instances, and payments made pursuant to “means-tested” anti-poverty programs, such as Supplemental Security Income and Temporary Assistance to Needy Families, are exempt

1 *Kalb v. United States*, 505 F.2d 506, 509 (2d Cir. 1974), *cert. denied*, 421 U.S. 979 (1975). The IRS is required to offset a taxpayer's refund to certain liabilities, such as non-tax federal debts, past-due child support, and state income tax and unemployment compensation debts. See IRC § 6402(c), (d).

2 Internal Revenue Manual 21.4.6.5.11.1, Offset Bypass Refund (OBR) (Sept. 6, 2022).

3 In the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Congress enacted IRC § 6428, providing for RRCs, payable in advance, which would not be offset to satisfy outstanding liabilities other than past-due child support obligations. See Pub. L. 116-136, § 2201(a), (d)(1)-(3). In the Consolidated Appropriations Act, 2021, Congress enacted IRC § 6428A, providing for additional RRCs, and amended section 2201 of the CARES Act to provide that only the portion of the RRCs that were paid as advance refunds were exempt from offset to satisfy outstanding liabilities other than past-due child support obligations. See Pub. L. No. 116-260, §§ 272(a), 273(b)(1). At TAS's urging, the IRS then exercised its discretion under IRC § 6402(a) to not offset RRCs, whether received in advance or claimed on a tax return, to satisfy outstanding tax liabilities, effective for returns filed on or after March 18, 2021. See, e.g., IRS Fact Sheet, FS-2021-17, QE2, A2 (Dec. 2021), <https://www.irs.gov/pub/taxpros/fs-2021-17.pdf>; IRS Fact Sheet, FS-2022-04, QF2, A2 (Jan. 2022), <https://www.irs.gov/pub/taxpros/fs-2022-04.pdf>.

4 IRC § 32. The Supreme Court has stated: “The earned income credit was enacted to reduce the disincentive to work caused by the imposition of social security taxes on earned income ... and to provide relief for low-income families hurt by rising food and energy prices.” *Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 864 (1986).

5 See Debt Collection Improvement Act of 1996, Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134 § 31001 110 Stat. 1321, 1321 (1996), (codified at 31 U.S.C. § 3716). The offsets are carried out through the Treasury Offset Program.

from offset when exemption is requested by the head of the agency administering the program.<sup>6</sup> The EITC is sometimes referred to as a means-tested benefit, although it does not meet the DCIA definition of that term.<sup>7</sup>

Nevertheless, the amount of the EITC depends in part on the amount of a taxpayer's earned income. In 2022, for example, joint filers with no qualifying children who earn more than \$22,610 will be ineligible for the credit; if they have two qualifying children and earn more than \$55,529, they will be ineligible for the credit. All other filers with no qualifying children who earn more than \$16,480 in 2022 will be ineligible for the credit; those with two qualifying children who earn more than \$49,399 will be ineligible for the credit.<sup>8</sup> Any taxpayer with more than \$10,300 of investment income in 2022 will be ineligible for the credit.<sup>9</sup>

## REASONS FOR CHANGE

Like other anti-poverty programs, Congress created the EITC to provide financial assistance for low-income individuals and families and to reduce poverty. The average adjusted gross income of taxpayers who received the EITC for tax year 2020 was \$20,174.<sup>10</sup>

Taxpayers whose EITC refund is subject to offset may request an OBR, but the timeframe for requesting an OBR is narrow. The IRS must approve an OBR between the date the return is filed and the date the IRS assesses the tax shown on the return. This period is approximately ten to 20 days when a return is filed electronically. In fiscal year 2022, only 377 taxpayers received OBRs.<sup>11</sup>

To its credit, the IRS has exercised its discretion to not offset some tax benefits to satisfy past-due federal tax liabilities, but the IRS has not adopted a policy of protecting EITC refunds from offset. Consistent with congressional recognition that offsets may impose economic hardships on recipients of federal benefits, the National Taxpayer Advocate recommends that Congress prohibit the IRS from offsetting the portion of a taxpayer's refund attributable to the EITC.

To be clear, we are not recommending that the full refund subject to offset be released – just the amount of the refund that is attributable to the EITC. Programming would be straightforward, rendering it easily administrable.<sup>12</sup>

## RECOMMENDATION

- Amend IRC § 6402(a) to prohibit offset of the EITC portion of a taxpayer's refund to satisfy prior-year tax liabilities.

6 31 U.S.C. § 3716(c)(3)(B). "Means-tested programs" are those which base eligibility on a determination that the income and/or assets of the beneficiary are inadequate to provide the beneficiary with an adequate standard of living without program assistance. 31 C.F.R. § 285.5(e)(7)(i). The Secretary of the Treasury has the discretion to exempt payments made under programs which are not means-tested, when so requested by the payment agency. 31 U.S.C. § (c)(3)(B); 31 C.F.R. § 285.5(e)(7)(ii).

7 See, e.g., House Committee on the Budget, *What you Need to Know About Means-Tested Entitlements* (May 1, 2017), <https://budget.house.gov/publications/report/what-you-need-know-about-means-tested-entitlements>, and Congressional Budget Office, *Federal Means-Tested Programs and Tax Credits – Infographic* (Feb. 11, 2013), <https://www.cbo.gov/publication/43935>.

8 Rev. Proc. 2021-45, 2021-48 I.R.B. 764.

9 *Id.*

10 IRS, Compliance Data Warehouse (CDW), Individual Return Transaction File (data as of Oct. 28, 2022).

11 IRS, CDW, Individual Master File Transaction History table (data as of Oct. 28, 2022).

12 The Section of Taxation of the American Bar Association (ABA) has also advocated for a prohibition against offsetting the refunds of EITC recipients during the pandemic. ABA, COMMENTS REGARDING REVIEW OF REGULATORY AND OTHER RELIEF TO SUPPORT TAXPAYERS DURING COVID-19 PANDEMIC (Jan. 15, 2021), <https://www.americanbar.org/content/dam/aba/administrative/taxation/policy/2021/011521comments.pdf>.

**Legislative Recommendation #15****Require the IRS to Waive User Fees for Taxpayers Who Enter Into Low-Cost Installment Agreements or Who Have an Adjusted Gross Income Equal to or Less Than 250 Percent of the Federal Poverty Level****SUMMARY**

- *Problem:* Financially struggling taxpayers who cannot pay their tax liabilities by the due date may enter into installment agreements (IAs) under which they make monthly payments. The IRS ordinarily charges these taxpayers a “user fee” to cover the agency’s cost in managing the monthly payment plan. Although user fees are modest, they may deter some low-income taxpayers from applying for IAs and paying their taxes voluntarily.
- *Solution:* Require the IRS to waive the user fee for IAs with taxpayers whose adjusted gross incomes are equal to or less than 250 percent of the Federal Poverty Level and taxpayers who enter into direct-debit IAs.

**PRESENT LAW**

In cases where a taxpayer is unable to pay the full amount of his or her tax liability in a single lump sum, IRC § 6159(a) authorizes the IRS to enter into an IA under which the taxpayer will pay the liability in monthly installments. A taxpayer can apply for an IA on paper or by using an online payment agreement (OPA).

The Independent Offices Appropriations Act of 1952 (31 U.S.C. § 9701) and Office of Management and Budget Circular A-25 authorize the IRS to set user fees by regulation. Pursuant to Treas. Reg. § 300.1, the IRS currently charges \$225 for entering into paper IAs and \$149 for entering into OPAs.<sup>1</sup> If a taxpayer authorizes the IRS to “direct debit” a bank account each month, the fee is reduced to \$107 for paper IAs and \$31 for OPAs. These fees are designed to enable the agency to recover the full costs of administering IAs.

For low-income taxpayers (*i.e.*, taxpayers whose incomes do not exceed 250 percent of the Federal Poverty Level), Treas. Reg. § 300.1 caps the IA fee at \$43. In addition, IRC § 6159(f)(2)(A) waives the fee for low-income taxpayers who enter into direct-debit IAs (DDIAs). Low-income taxpayers who cannot enter into DDIAs (*e.g.*, because they do not have a bank account) must pay the IA fee, but if they make all payments required under the IA, IRC § 6159(f)(2)(B) requires the IRS to reimburse the amount of the IA fee to them. In 2018, Congress amended IRC § 6159(f)(1) to prohibit the IRS from increasing the IA user fees.

**REASONS FOR CHANGE**

Even the reduced IA user fee for low-income taxpayers may deter these taxpayers from applying for IAs and paying their taxes voluntarily. Taxpayers ineligible for the reduced fee may also be experiencing some level of financial hardship, as evidenced by their inability to pay their balance at once. The cost to the IRS of OPAs and DDIAs is so low that requiring a user fee may cost the government more in lost tax revenue and increased enforcement costs than the user fee generates.

<sup>1</sup> See User Fees for Installment Agreements (IAs), T.D. 9798, 81 Fed. Reg. 86,955 (Dec. 2, 2016).

The IRS is required to identify low-income individuals who request an IA, and it does so systemically by placing an indicator on a taxpayer's account based on the taxpayer's last filed return. Taxpayers whose accounts are marked with a low-income indicator do not pay the \$43 fee when they request an IA. Low-income taxpayers without the indicator on their accounts may complete and submit Form 13844, Application for Reduced User Fee for Installment Agreement, for fee waiver approval. Removing the requirement to pay for an IA could encourage more low-income taxpayers to become compliant with their tax obligations. Taxpayers whose incomes exceed the 250 percent threshold and who enter into DDIA's should also be relieved of paying an IA user fee. This would incentivize more taxpayers to shift to an online resolution and acknowledge that this virtual transaction involves minimal employee cost for the IRS.

## RECOMMENDATION

- Amend IRC § 6159 to require the IRS to waive the user fee for all direct-debit IAs and for IAs with taxpayers whose adjusted gross income is equal to or less than 250 percent of the Federal Poverty Level.<sup>2</sup>

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<sup>2</sup> For legislative language generally consistent with this recommendation, see Taxpayer Bill of Rights Enhancement Act of 2017, S. 1793, 115th Cong. § 301 (2017); Taxpayer Protection and Assistance Act, S. 1321, 109th Cong. § 301 (2006).

**Legislative Recommendation #16****Improve Offer in Compromise Program Accessibility by Repealing the Partial Payment Requirement and Restructuring the User Fee****SUMMARY**

- *Problem:* Financially struggling taxpayers who cannot afford to pay their tax liabilities in full may apply for an “offer in compromise” (OIC). Under an OIC, the IRS agrees to accept less than full payment in satisfaction of the debt. Currently, taxpayers are required to include non-refundable partial payments with their OIC applications. The Treasury Department has acknowledged that the partial payment requirement may substantially reduce access to the OIC program and has estimated that repealing the requirement would raise revenue.
- *Solution:* Repeal the requirements that taxpayers include partial payments with OIC applications.

**PRESENT LAW**

IRC § 7122(a) authorizes the IRS to settle a tax debt by accepting an OIC. According to Policy Statement 5-100, the IRS will “accept an offer in compromise when it is unlikely that the tax liability can be collected in full and the amount offered reasonably reflects collection potential.” Taxpayers whose offers are accepted must file and pay their taxes for the next five years, as stated on IRS Form 656, Offer in Compromise (2022) (Section 7, items l and m). If they fail to remain in compliance for the five-year period, the IRS may seek to collect the amounts it compromised.

IRC § 7122(c)(1)(A) requires a taxpayer who would like the IRS to consider a “lump-sum” offer – payable in five or fewer installments – to include a nonrefundable partial payment of 20 percent of the amount of the offer with the application. IRC § 7122(c)(1)(B) requires a taxpayer who would like the IRS to consider a “periodic payment” offer – an offer payable in six or more installments – to include the first proposed installment with the application and to continue to make installment payments while the IRS is considering it. In addition to these upfront partial payments, Treas. Reg. § 300.3 requires that most offer applications include a \$205 user fee. IRC § 7122(c)(3) provides that taxpayers with low incomes (*i.e.*, taxpayers with adjusted gross incomes for the most recent tax year, or taxpayers with household gross monthly incomes multiplied by 12 months, that is not more than 250 percent of the Federal Poverty Level guidelines) are not subject to the user fee or the partial payment requirement.<sup>1</sup> They may apply for a waiver on Form 656.

**REASONS FOR CHANGE**

By accepting an offer, the IRS often collects money it would not otherwise collect and may convert a noncompliant taxpayer into a compliant one by requiring the taxpayer, as a condition of the agreement, to timely file returns and pay taxes for the following five years. The Treasury Department’s General Explanations of the Administration’s Fiscal Year 2017 Revenue Proposals acknowledged the benefit of offers by proposing to repeal the partial payment requirement, explaining that the requirement “may substantially reduce access to the offer in compromise program. ... Reducing access to the offer-in-compromise program makes it more

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<sup>1</sup> See also Treas. Reg. § 300.3(b)(ii) & (iii).

difficult and costly to obtain the collectable portion of existing tax liabilities.” The Treasury Department estimated that repealing the requirement would raise revenue.<sup>2</sup>

A 2007 TAS study found that taxpayers above the low-income threshold were no better able to afford to make partial payments than those below it and that those below it frequently did not obtain a waiver. Similarly, a 2005 Treasury Inspector General for Tax Administration report found that when the IRS first imposed a user fee (it was \$150 in 2003), OIC submissions declined by more than 20 percent among taxpayers at every income level, including those who were eligible for a fee waiver. Furthermore, after the partial payment requirement was imposed, the slight increase in the offer acceptance rate did not offset the 26 percent decrease in submitted offers, suggesting that higher upfront costs deterred many taxpayers from submitting acceptable offers. Thus, upfront payments such as the user fee and the partial payment requirement likely reduce collections and increase enforcement costs.

## RECOMMENDATION

- Amend IRC § 7122(c) to remove the requirement that taxpayers include a partial payment with offer applications and restructure the user fee so that it is collected out of amounts otherwise due on accepted offers.<sup>3</sup>

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2 In the past, the IRS expressed concern that repealing the partial payment requirement or limiting the user fee might have the effect of increasing the number of frivolous offers. To address concerns about frivolous submissions, Congress enacted a frivolous submissions penalty under IRC § 6702(b). In general, it imposes a penalty of \$5,000 on any person who submits a frivolous OIC application (among other frivolous submissions).

3 For legislative language generally consistent with this recommendation, see John Lewis Taxpayer Protection Act, H.R. 3738, 117th Cong. § 206 (2021); Taxpayer Protection Act, H.R. 2171, 115th Cong. § 206 (2017); Taxpayer Protection Act, H.R. 4912, 114th Cong. § 206 (2015); Taxpayer Assistance Act, H.R. 4994, 111th Cong. § 202 (2010). For additional background, see, e.g., National Taxpayer Advocate 2006 Annual Report to Congress 507-519 (Legislative Recommendation: *Improve Offer in Compromise Program Accessibility*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2006\\_arc\\_section2\\_v2.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2006_arc_section2_v2.pdf).

**Legislative Recommendation #17****Modify the Requirement That the Office of Chief Counsel Review Certain Offers in Compromise****SUMMARY**

- *Problem:* The IRS Office of Chief Counsel is currently required to review and provide a legal opinion for every accepted offer in compromise (OIC) if the amount of unpaid tax is \$50,000 or more, even though the IRS determines whether to accept an OIC primarily based on an analysis of the taxpayer's financial condition and very few OICs present significant legal issues. This requirement delays OIC processing and diverts Counsel attorneys from performing their core legal work.
- *Solution:* Revise current law to require Counsel review of OICs only in cases that present significant legal issues.

**PRESENT LAW**

IRC § 7122 authorizes the Secretary to enter into an agreement with a taxpayer that settles the taxpayer's tax liabilities for less than the full amount owed, as long as the taxpayer's case has not been referred to the Department of Justice. Such an agreement is known as an OIC. Treas. Reg. § 301.7122-1(b) provides that the IRS may compromise liabilities to the extent there is doubt as to liability or doubt as to collectibility, or to promote effective tax administration. The regulations further define these terms and describe instances when compromise is appropriate.

IRC § 7122(b) requires the Treasury Department's General Counsel to review and provide an opinion for accepted OICs in all criminal cases and in all civil cases where the amount of unpaid tax assessed (including any interest, additional amount, addition to tax, and assessable penalty) is \$50,000 or more. This authority is exercised by the IRS Office of Chief Counsel.<sup>1</sup>

**REASONS FOR CHANGE**

The IRS receives tens of thousands of OIC applications every year. It decides whether to accept an OIC primarily by performing a financial analysis that compares the taxpayer's ability to pay (based on income and assets) with the taxpayer's allowable living expenses. Currently, the IRS also must verify that the legal and IRS policy requirements for compromise are met prior to proposing acceptance, even though very few OICs present significant legal issues that require Office of Chief Counsel involvement. The time Counsel employees spend learning the facts of every criminal OIC case and civil OIC case where the amount of unpaid tax assessed is \$50,000 or more and writing opinions creates significant delays in OIC processing and is often duplicative of work the IRS has already performed. It also requires a significant commitment of legal resources on the part of the IRS. The Office of Chief Counsel reports that it spends thousands of hours each year reviewing OICs.<sup>2</sup> Taxpayers would be better served if those resources could be allocated elsewhere.

In addition, delays in OIC processing may impede a taxpayer's ability to make other financial decisions while awaiting a response and may even jeopardize the taxpayer's ability to pay the amount offered if his or her financial circumstances deteriorate while the OIC is awaiting Counsel review.

<sup>1</sup> See Internal Revenue Manual 8.23.4.3.3, Counsel Review of Acceptance Recommendations (Apr. 7, 2022).

<sup>2</sup> Emails from IRS Office of Chief Counsel (Nov. 29, 2021; Sept. 1, 2020; and Aug. 9, 2019) (on file with TAS).



The National Taxpayer Advocate believes the OIC process would be improved if Congress repeals the blanket requirement that Counsel review all OICs in civil cases where the unpaid tax assessed is \$50,000 or more and replace it with language authorizing the Secretary to require Counsel review in cases that present significant legal issues.<sup>3</sup>

## RECOMMENDATION

- Amend IRC § 7122(b) to repeal the requirement that Counsel review all OICs in civil cases where the amount of unpaid tax assessed (including any interest, additional amount, addition to tax, or assessable penalty) is \$50,000 or more and replace it with language authorizing the Secretary to require Counsel review of OICs in cases that the Secretary determines present significant legal issues.<sup>4</sup>

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<sup>3</sup> The Secretary may issue guidance that specifies how the IRS will determine whether a significant legal issue exists. For example, the IRS employee evaluating the OIC application could be given the authority to make the determination, or OIC applications involving unpaid tax assessments above a certain threshold (e.g., \$1 million) could be submitted to Counsel personnel, who could make the determination without having to provide a legal opinion unless a significant legal issue is identified.

<sup>4</sup> For legislative language generally consistent with this recommendation, see Taxpayer Bill of Rights Enhancement Act of 2017, S. 1793, 115th Cong. § 303 (2017); Taxpayer Bill of Rights Enhancement Act of 2015, S. 1578, 114th Cong. § 403 (2015); Tax Administration Good Government Act, S. 882, 108th Cong. § 104 (2003); Tax Administration Good Government Act, H.R. 1528, 108th Cong. § 304 (2004).

**Legislative Recommendation #18****Require the IRS to Refund Any Payment Collected Pursuant to a Federal Tax Lien That Exceeds the Amount of an Accepted Offer in Compromise****SUMMARY**

- *Problem:* Before the IRS agrees to accept an offer in compromise, it carefully evaluates the taxpayer's financial condition and calculates the amount it believes the taxpayer can reasonably afford to pay while leaving the taxpayer with enough funds to pay his or her basic living expenses. If the taxpayer sells property subject to a tax lien after the offer is accepted but before paying the agreed amount in full, however, the IRS may keep more than the amount it calculated the taxpayer could reasonably afford to pay.
- *Solution:* Require the IRS to return to the taxpayer any amount collected in excess of the amount the IRS determined the taxpayer could reasonably afford to pay (unless the IRS determines that the taxpayer materially misrepresented his or her financial condition).

**PRESENT LAW**

IRC § 7122 authorizes the Secretary to sign an agreement (an “offer in compromise” or OIC) with a taxpayer to settle the taxpayer's tax liabilities for less than the amount owed. OICs take one of two forms: (i) the taxpayer may pay the agreed amount in a single lump-sum<sup>1</sup> or (ii) the taxpayer may pay the agreed amount through periodic payments, generally monthly.<sup>2</sup> Treas. Reg. § 301.7122-1(b) provides that the IRS may compromise liabilities to the extent there is doubt as to liability or doubt as to collectibility, or to promote effective tax administration. With respect to offers based on doubt as to collectibility, the IRS has a legal basis to compromise when the taxpayer's equity in assets and future income potential are less than the taxpayer's liabilities.

The IRS follows guidelines set forth in Internal Revenue Manual (IRM) 5.8.5 to evaluate a taxpayer's equity in assets and future income potential. According to IRS Policy Statement 5-100, an OIC is considered a “legitimate alternative to declaring a case as currently not collectible or to a protracted installment agreement,” and the goal is to “achieve the collection of what is potentially collectible at the earliest possible time and at the least cost to the government.”<sup>3</sup>

Taxpayers seeking an OIC must complete Form 656, Offer in Compromise. Taxpayers seeking an OIC based on Doubt as to Collectibility must also complete a Collection Information Statement on Form 433. Section 7 of Form 656 includes certain terms and conditions a taxpayer must accept when submitting an OIC. In Paragraph (o) of Section 7, taxpayers agree that failure to meet the terms of an OIC, such as by missing payments, may cause default of the offer, possibly resulting in reinstatement of the full tax liability, plus penalties and interest. In Paragraph (q) of Section 7, taxpayers agree that:

The IRS may file a Notice of Federal Tax Lien during consideration of the offer or for offers that will be paid over time. If the offer is accepted, the tax lien(s) for the periods and taxes listed in Section 1 will be released within 35 days after the payment has been received and verified. The time it takes to transfer funds to the IRS from commercial institutions varies based on the form of payment. If I have

<sup>1</sup> See IRC § 7122(c)(1)(A).

<sup>2</sup> See IRC § 7122(c)(1)(B).

<sup>3</sup> IRM 1.2.1.6.17, Policy Statement 5-100, Offers will be accepted (Jan. 30, 1992).

not finished paying my offer amount, then the IRS may be entitled to any proceeds from the sale of my property. The IRS will not file a Notice of Federal Tax Lien on any individual shared responsibility debt.

IRC § 6331(a) authorizes the IRS to “levy upon all property and rights to property,” but the IRS generally cannot levy while an offer is pending, for 30 days following the rejection of an offer, or during any period when an appeal is being considered.<sup>4</sup> The IRS may maintain a lien on any property owned by the taxpayer until all payments are made.<sup>5</sup>

## REASONS FOR CHANGE

When the IRS accepts an OIC, the IRS contracts to settle a tax liability for less than the full amount of the liability. Prior to accepting an OIC, the IRS carefully reviews and verifies the taxpayer’s financial condition.<sup>6</sup> It calculates the taxpayer’s “reasonable collection potential” (RCP) based on the taxpayer’s net realizable equity in assets plus future income, reduced for allowable living expenses.<sup>7</sup> Generally, an OIC is not accepted unless the offer proposed by the taxpayer is equal to or greater than the RCP, as calculated by the IRS.

In certain situations where the IRS has filed a lien on taxpayer property, the IRS may end up collecting more than the amount originally calculated as the taxpayer’s reasonable collection potential. IRC § 6325 and IRS internal guidance call for a lien on property to remain in place until the taxpayer has made all payments.<sup>8</sup> If a taxpayer sells property subject to a lien prior to completing payment on the OIC, liens superior to the federal tax lien must be satisfied and the costs of sale must be paid. Thereafter, the IRS may take the remaining sale proceeds up to the full amount of its original lien, as provided by IRC § 6321 and stated in Section 7, Paragraph (q), of Form 656.<sup>9</sup> As a result, the IRS may collect more than it determined the taxpayer could reasonably afford to pay when it accepted the OIC.<sup>10</sup>

## RECOMMENDATION

- Amend IRC § 7122 to require the IRS to return to the taxpayer any amount collected pursuant to a federal tax lien in excess of the payment amount of an accepted OIC, unless otherwise agreed upon, provided the taxpayer disclosed all material income and assets to the IRS on his or her application and made all payments in accordance with the terms of the agreement.

<sup>4</sup> See IRC § 6331(k).

<sup>5</sup> IRS, Form 656-B, Offer in Compromise (Apr. 2022).

<sup>6</sup> IRM 5.8.5, Financial Analysis (Sept. 24, 2021).

<sup>7</sup> IRM 5.8.4.3.1, Components of Collectibility (Apr. 30, 2015).

<sup>8</sup> IRM 5.8.10.6, Discharge and Subordination Requests (Mar. 10, 2022).

<sup>9</sup> IRM 5.8.10.6(4), Discharge and Subordination Requests (Mar. 10, 2022) (providing an example).

<sup>10</sup> In some cases, the IRS enters into collateral agreements in which the IRS and the taxpayer agree that if real property is sold, the IRS will automatically receive a certain percentage of the sale price, even if the OIC offer amount is paid in full.

**Legislative Recommendation #19**

## **Require the IRS to Release All Levies Upon Acceptance of an Offer in Compromise and Return to the Taxpayer Any Amount Collected Pursuant to the Levies in Excess of the Agreed Payment Amount**

**SUMMARY**

- *Problem:* When the IRS considers a taxpayer's application for an offer in compromise (OIC), it generally computes the maximum amount it believes the taxpayer can afford to pay while still leaving the taxpayer with enough funds to pay for his or her basic living expenses, such as food, shelter, and clothing. In some cases, the IRS collects more than the agreed amount stipulated in the OIC through a continuous levy or a levy on a taxpayer's fixed and determinable right to payment, potentially leaving the taxpayer without enough funds to pay for basic living expenses.
- *Solution:* Require the IRS to release all levies when an OIC is accepted and to return to the taxpayer any amounts collected by levy in excess of the accepted offer amount.

**PRESENT LAW**

IRC § 7122 authorizes the IRS to compromise tax liabilities and, in doing so, to make allowances to ensure that taxpayers are left with “an adequate means to provide for basic living expenses.”<sup>1</sup> OICs are a routinely-used vehicle for addressing these tax liabilities.

IRC § 6331 authorizes the IRS to levy on a taxpayer's property and rights to property to collect a tax liability, following notice and demand. Under IRC § 6331(b), “a levy shall extend only to property possessed and obligations existing at the time thereof.” However, a levy may attach to future payments where the IRS issues a continuous levy on salary and wages,<sup>2</sup> or issues a levy on certain federal payments,<sup>3</sup> or on a fixed and determinable right to payment.<sup>4</sup>

IRC § 6331(k)(1) and Treas. Reg. § 301.7122-1(g)(1) provide that the IRS will not levy against the property or rights to property of the taxpayer while an OIC is pending, during the 30 days following rejection of the OIC, or during a timely appeal of the rejection decision. But where a levy that attaches to future payments is already in place, the IRS takes the position that it is not legally prohibited from continuing to collect through the levy, even after an OIC is pending or accepted.<sup>5</sup> Further, the IRS takes the position that it has no obligation to repay amounts collected under such levies, even if the amounts collected ultimately exceed the amount agreed to in the OIC, because the levy payments do not create overpayments.<sup>6</sup>

**REASONS FOR CHANGE**

When a taxpayer submits and the IRS accepts an OIC, the agreement generally reflects an IRS determination that the OIC amount is the maximum payment the taxpayer can afford to make while still retaining enough funds to pay his or her basic living expenses. Prior to accepting an OIC, the IRS carefully reviews and

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<sup>1</sup> IRC § 7122(d).

<sup>2</sup> IRC § 6331(e).

<sup>3</sup> IRC § 6331(h).

<sup>4</sup> Treas. Reg. § 301.6331-1; Treas. Reg. § 301.6343-1(b).

<sup>5</sup> This position is also supported by *U.S. v. Ryals*, 480 F.3d 1101, 1109 (11th Cir. 2007).

<sup>6</sup> IRC § 6402; *Jones v. Liberty Glass*, 332 U.S. 524, 531 (1947) (defining “overpayment” as “any payment in excess of that which is properly due”).

verifies the taxpayer's financial condition and calculates the taxpayer's "reasonable collection potential" (RCP), accounting for assets, future income, other lienholders, and allowable living expenses. An OIC generally is not accepted unless the amount proposed by the taxpayer is equal to or greater than the RCP, as calculated by the IRS.<sup>7</sup>

In some cases, the IRS will have served a levy on a taxpayer's income stream, such as Social Security benefits, or a continuous levy on wages before the taxpayer submitted an OIC.<sup>8</sup>

The IRS may leave the levy in place while it considers the OIC, and it may even leave the levy in place while the taxpayer is making payments on an accepted OIC.<sup>9</sup> In cases where the IRS receives payments from a levy after an OIC is accepted but before all payments under the OIC have been received from the taxpayer, it will collect more from the taxpayer than the agreed amount stipulated in the OIC and typically more than the maximum amount it computed the taxpayer can afford to pay. This can leave the taxpayer without sufficient funds to pay his or her basic living expenses.

*Example:* A taxpayer subject to a wage levy submits an OIC. The IRS calculates the taxpayer's RCP to be \$5,000. The terms of the OIC require the taxpayer to pay \$4,000 upon acceptance and \$1,000 six months after acceptance. The IRS receives \$1,200 on the wage levy after acceptance and before the \$1,000 payment is received. The \$1,200 is applied to the unpaid liability and not treated as a payment on the OIC. The IRS would collect \$1,200 more than it determined that the taxpayer could reasonably afford to pay.

The National Taxpayer Advocate believes that when the IRS performs a financial analysis and determines a taxpayer's reasonable collection potential, it generally should not collect amounts in excess of the RCP. Outstanding levies against the taxpayer should be discontinued unless the payments obtained through the levies are a part of the OIC agreement or the taxpayer has acted in bad faith, and amounts collected in excess of the RCP should be returned to the taxpayer. In most cases, the IRS does release levies when it accepts an OIC, particularly levies other than continuous wage levies or those attached to fixed and determinable rights to payment, but taxpayers currently have no straightforward legal protection if routine procedures go awry.

## RECOMMENDATION

- Amend IRC §§ 7122 and 6343 to require the IRS to release all levies when an OIC is accepted and to return to the taxpayer any amounts collected by levy in excess of the accepted offer amount, unless the taxpayer and the IRS reach a contrary agreement or the taxpayer did not disclose all material income and assets to the IRS.

7 The recommendation is generally focused on OICs based on doubt as to collectibility, which constitute the overwhelming majority of OICs received and processed. It should be noted, however, that OICs may be submitted on any of four grounds: doubt as to collectibility, doubt as to liability, effective tax administration (ETA) due to economic hardship, or ETA due to public policy or equitable considerations. See Treas. Reg. § 301.7122-1(b). The IRS does not perform a financial analysis for OICs based on doubt as to liability. See IRC § 7122(d)(3)(B)(ii). For ETA offers, a full financial analysis is required to determine the RCP and an acceptable OIC amount. However, the IRS only considers an ETA OIC if the taxpayer's RCP exceeds his or her tax liability. Internal Revenue Manual (IRM) 5.8.11.5.2, Financial Statement Analysis (Aug. 5, 2015) and IRM 5.8.11.3(5), Legal Basis for Effective Tax Administration Offer) (Oct. 4, 2019).

8 IRC §§ 6331(e) & 6631(h).

9 See IRS Form 656 (Rev. 4-2022), section 7(g); IRM 5.8.8.14(1), Continuous Wage Levy (Dec. 17, 2019).

**Legislative Recommendation #20****Require the IRS to Mail Notices at Least Quarterly to Taxpayers With Delinquent Tax Liabilities****SUMMARY**

- *Problem:* The IRS is required to send billing notices to taxpayers with tax debts once a year. Private businesses typically send billing notices more frequently, often monthly. By sending infrequent billing notices, the IRS receives fewer payments from taxpayers, and as a result, more taxpayers will face aggressive IRS collection actions such as levies and liens.
- *Solution:* The IRS should send billing notices to taxpayers with tax debts at least quarterly.

**PRESENT LAW**

IRC § 7524 requires the IRS, “[n]ot less often than annually,” to send taxpayers with delinquent accounts a written notice that sets forth the amount of the tax delinquency as of the date of the notice.

**REASONS FOR CHANGE**

The IRS satisfies the IRC § 7524 requirement by sending taxpayers with delinquent accounts Notice CP-71, Reminder Notice, once a year. However, the infrequency of IRS billing notices leaves collectible revenue uncollected and subjects taxpayers who would make payments if they received more frequent reminders to additional penalties and interest charges. It also subjects taxpayers who would make payments if they received more frequent reminders to wage garnishments, bank account levies, and property liens.

We recognize that sending more frequent notices after the IRS’s initial notice stream would entail additional postage and processing costs. However, private sector businesses, including credit card issuers and retailers, face this same trade-off, and they almost uniformly send billing notices more frequently than once a year. Most send delinquency notices on at least a monthly basis. They evidently have found that frequent notices generate more revenue, net of costs. Many individual and business taxpayers face financial challenges and prioritize paying the bills of creditors who are sending regular notices and are top of mind.

**RECOMMENDATION**

- Amend IRC § 7524 to require the IRS to notify taxpayers of delinquent tax liabilities at least quarterly.<sup>1</sup>

<sup>1</sup> For legislative language generally consistent with this recommendation, see Protecting Taxpayers Act, S. 3278, § 201, 115th Cong. (2018). As more taxpayers establish online accounts, the IRS will be able to transmit notices to taxpayers electronically rather than by snail mail. For that reason, we are phrasing our recommendation broadly to allow that means of communication as an option.

**Legislative Recommendation #21****Clarify When the Two-Year Period for Requesting Return of Levy Proceeds Begins****SUMMARY**

- *Problem:* The IRS is authorized to return money wrongfully levied upon if the taxpayer or third party requests the return within two years from the “date of levy.” For paper levies delivered by hand or mail, the “date of levy” is the date the notice of levy was served. For levies imposed by electronic means, the “date of levy” is the date on which the IRS received the levied proceeds. Consequently, individuals subject to electronic levies often are able to recover wrongfully levied funds that taxpayers subject to paper levies may not recover.
- *Solution:* Allow the IRS to return funds received through wrongful levies if the funds were received by the IRS within the preceding two years, regardless of the date the original levy was served.

**PRESENT LAW**

IRC § 6331(a) allows the IRS to levy on a taxpayer’s property and rights to property that exist at the time the levy is served. Rights to property include fixed and determinable obligations to which the levy attaches, even if receipt of a payment arising from the obligation is deferred until a later date.

IRC § 6331(e) allows the IRS to serve a levy on the taxpayer’s salary or wages that continues from the date the levy is first made until the levy is released under IRC § 6343.

IRC § 6331(h) allows the IRS to serve a levy on federal payments specified under that provision, such as Social Security benefits, which continues from the date the levy is first made until the levy is released. This levy is made by electronic means under the Federal Payment Levy Program (FPLP).

IRC § 6343(b) authorizes the IRS to return money levied upon or money received from the sale of levied property to *third parties* when it determines the levy was wrongful within the meaning of IRC § 7426(a)(1), provided that the third party requests the return within two years from the “date of levy.”

IRC § 6343(d) authorizes the IRS to return money levied upon or money received from the sale of levied property to *the taxpayer* when it determines one of the circumstances specified in IRC § 6343(d)(2) exists, provided that the taxpayer requests the return within two years from the “date of levy.”<sup>1</sup>

For levies delivered by hand, the IRS takes the position that the “date of levy” is the date of delivery.<sup>2</sup> For mailed levies, Treas. Reg. § 301.6331-1(c) similarly defines the term “date of levy” as the date the levy is delivered to the person in possession of the property. By contrast, for levies imposed by electronic means through the FPLP, the IRS has adopted a policy to return all or a portion of the FPLP proceeds it received during the two-year period preceding the date of request for their return without regard to the date the initial levy was delivered.<sup>3</sup>

<sup>1</sup> IRC § 6343(b) & (d) permits the IRS to return specific property levied upon at any time.

<sup>2</sup> *Cf. American Honda Motor Co., Inc. v. United States*, 363 F. Supp. 988, 991-992 (S.D.N.Y. 1973) (holding that date of levy for purposes of timely filing suit under IRC § 6532(c)(1) is the date when the notice of levy is served upon the person in possession of the taxpayer’s property).

<sup>3</sup> The Treasury regulations under IRC § 6331 do not define the term “date of levy” when the levy occurs through electronic means as used in the FPLP. The IRS’s policy is set forth in the Internal Revenue Manual (IRM). See IRM 5.19.9.3.7(5), Returning SITLP Payments (June 23, 2022); IRM 5.11.7.3.7(2), Returning FPLP Levy Proceeds (July 1, 2022).



## REASONS FOR CHANGE

The IRS may issue levies to attach a taxpayer's assets, such as wages, pension benefits, annuities, or Social Security benefits, that result in multiple payments over many years. The IRS has the authority to return levy proceeds to a third party or the taxpayer if the person requests the proceeds within two years of the date of levy. The IRS generally interprets the "date of levy" to mean the date the IRS delivers a notice of levy by mail or by hand to the person in possession of the property levied. In the case of a continuous levy under IRC § 6331(e), the date of levy is the date the notice of levy is first served by hand or by mail on the person in possession of the taxpayer's salary or wages.<sup>4</sup> If the taxpayer requests return of levy payments more than two years after the date the notice of levy was served, the IRS is not authorized to return any payments. In the case of FPLP levies under IRC § 6331(h), however, the IRS will return a levied payment if the payment was made within the two-year period before the date of the request for return. This results in similarly situated persons being treated differently and infringes upon a third party or taxpayer's *right to a fair and just tax system*.

*Example:* Assume the IRS issues a continuous levy under IRC § 6331(e) to the taxpayer's employer in Year One, and the employer withholds and pays over to the IRS a portion of the taxpayer's paychecks for each month of the next four years. Then in Year Four, the taxpayer's dependent becomes ill, and as a result, his living expenses increase significantly due to large medical bills. The levy is now causing an economic hardship to the taxpayer.

The taxpayer asks the IRS to release the levy and return the portion of the levy proceeds that were taken during the time in which the taxpayer was experiencing economic hardship, and the IRS agrees that it is in the best interests of the taxpayer and the government to do so. However, the IRS is prohibited from returning the levy proceeds to the taxpayer because more than two years have elapsed since the date the levy was served on the employer.

Contrast this result with a taxpayer whose Social Security benefits are levied under the FPLP. The IRS may return up to the last two years of levy payments even if the request occurs more than two years after the FPLP levies began.

## RECOMMENDATION

- Amend IRC § 6343(b) to strike the term "date of such levy" and substitute "each date the IRS receives money from the levy or the date the IRS receives the money from the sale of levied property."

<sup>4</sup> Such a levy is issued via Form 668-W and is generally a "paper" levy. A paper levy is defined as "either a manual or systemic levy on Form 668-A, or Form 668-W, that is prepared and issued by an RO." IRM 5.11.5.1.6, Terms/Definitions/Acronyms (June 13, 2018). This differs from an FPLP levy, which is an automated levy. Automated levies are "levies issued through the Automated Levy Programs. These levies are transmitted electronically. The proceeds are also received electronically." *Id.*

**Legislative Recommendation #22****Protect Retirement Funds From IRS Levies, Including So-Called “Voluntary” Levies, in the Absence of “Flagrant Conduct” by a Taxpayer****SUMMARY**

- *Problem:* Congress has provided significant tax incentives to encourage Americans to save for retirement. Those policies reflect recognition that almost all workers eventually retire and require retirement savings to pay their basic living expenses and that taxpayers who do not have savings are likely to qualify for costly public assistance programs. Those policies are undermined when the IRS encourages or allows taxpayers with tax liabilities to agree to “voluntary” levies on their retirement accounts.
- *Solution:* Prohibit the IRS from levying on retirement accounts unless a taxpayer has engaged in “flagrant conduct.”

**PRESENT LAW**

The IRS has wide discretion to exercise its levy authority. IRC § 6331(a) provides that the IRS generally may “levy upon all property and rights to property” of the taxpayer, which includes retirement savings. Some property is exempt from levy pursuant to IRC § 6334.

As a policy matter, the IRS has decided not to levy on a taxpayer’s retirement savings unless it determines that the taxpayer has engaged in “flagrant conduct.”<sup>1</sup> However, there is no definition of the term “flagrant conduct” for purposes of this analysis in the IRC or the regulations. Although the Internal Revenue Manual (IRM) provides examples of flagrant conduct, it provides little protection to taxpayers. Taxpayers generally may not rely on IRM violations as a basis for challenging IRS actions in court, and the IRS may modify or rescind IRM provisions at any time without congressional or public input.<sup>2</sup>

**REASONS FOR CHANGE**

Congress has provided significant tax incentives to encourage taxpayers to save for retirement. There are strong public policy reasons to encourage retirement savings and to shield retirement savings from IRS levies. Almost all workers eventually retire, and they require retirement savings to pay for basic living expenses. In addition, retired taxpayers who do not have sufficient savings are more likely to experience economic hardship and qualify for public assistance, which other taxpayers pay to provide.

The IRS has taken certain steps to protect retirement savings by requiring a specialized analysis prior to levy, including a determination of whether the taxpayer engaged in “flagrant conduct.” However, certain changes in IRS procedures have eroded these protections. Specifically, the IRS has adopted procedures that allow taxpayers to request or agree to “voluntary” levies on retirement accounts.<sup>3</sup> If a taxpayer agrees to a “voluntary” levy, the IRS bypasses the determination of “flagrant conduct.”<sup>4</sup>

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1 IRM 5.11.6.3(5), Funds in Pension or Retirement Plans (May 26, 2021).

2 The IRM provides 16 examples of flagrant conduct. See IRM 5.11.6.3(6), Funds in Pension or Retirement Plans (May 26, 2021).

3 IRM 5.11.6.3(3), Funds in Pension or Retirement Plans (May 26, 2021).

4 The IRS will still verify that the taxpayer has received collection due process rights and considered collection alternatives and will analyze whether the taxpayer relies on funds in the retirement account (or will in the near future) for necessary living expenses. IRM 5.11.6.3(3), (4), and (7), Funds in Pension or Retirement Plans (May 26, 2021).

As a result, taxpayers who have not engaged in “flagrant conduct” in their tax matters and who therefore would have been shielded from levies on their retirement accounts in the past may agree to “voluntary” levies out of fear or anxiety and thus may find themselves in economic hardship during retirement.

Under IRC § 6334, the IRS is prohibited from levying on certain sources of payment, such as unemployment and child support. These exceptions reflect policy determinations. For example, Congress has determined that the IRS should not levy on child support payments because doing so would likely harm the children who rely on those benefits for support. To better protect retirement savings, the National Taxpayer Advocate believes that retirement savings should be added to the list of exempt property, absent “flagrant conduct,” and that the term “flagrant conduct” should be defined in the statute.

## RECOMMENDATIONS

- Amend IRC § 6334(a) to include qualified retirement savings as a category of property exempt from levy unless it is determined that the taxpayer has engaged in “flagrant conduct.”<sup>5</sup>
- Amend IRC § 6334 to define “flagrant conduct” as willful action (or failure to act) that is voluntarily, consciously, and knowingly committed in violation of any chapter of Title 26 and that appears to a reasonable person to be a gross violation of any such provision.<sup>6</sup>

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5 In rare cases, a taxpayer with millions of dollars in retirement savings may be delinquent in paying his or her tax debts without having engaged in flagrant conduct. To avoid providing an unlimited exemption from levy in these cases, Congress could make the levy exemption subject to a cap, such as \$1 million in qualified retirement savings, and index it for inflation to maintain its value in future years.

6 For legislative language generally consistent with this recommendation, see John Lewis Taxpayer Protection Act, H.R. 3738, 117th Cong. § 203 (2021); Taxpayer Protection Act, H.R. 4912, 114th Cong. § 203 (2016); and Taxpayer Rights Act, S. 2333 and H.R. 4128, 114th Cong. §§ 306 & 307 (2015).

**Legislative Recommendation #23****Provide Taxpayer Protections Before the IRS Recommends the Filing of a Lien Foreclosure Suit on a Principal Residence****SUMMARY**

- *Problem:* Seizing and selling a taxpayer's home is one of the most severe and potentially devastating actions the IRS may take to collect a tax debt. The law provides two alternative procedures by which the IRS may seize and sell a home. Under one procedure (administrative seizure), the law provides significant and meaningful taxpayer protections before a seizure and sale may take place. Under the other procedure (lien foreclosure), far fewer procedural safeguards exist.
- *Solution:* Provide taxpayers and their families who are subject to lien foreclosure suits to seize their principal residences with the same protections as taxpayers who are subject to administrative sales of their principal residences.

**PRESENT LAW**

The sale of a taxpayer's principal residence to satisfy a tax liability is one of the most intrusive collection remedies that can be imposed against a taxpayer by the IRS. The IRS may follow either of two sets of procedures to seize and sell the principal residence of a taxpayer to satisfy a delinquent tax liability: (i) an administrative seizure or (ii) a lien foreclosure suit. The two cannot be used concurrently. Generally, the IRS will prefer the administrative seizure and sale procedures unless there are "questions concerning title to the particular property or priorities of liens that create an unfavorable or impossible market for administrative sale," or "it may be difficult to obtain the property or to preserve its value, and the aid of the court is necessary through specific order or the appointment of a receiver."<sup>1</sup> Thus, the IRS uses the foreclosure procedure to enhance its ability to sell the property and obtain a higher sale price.

**Administrative Seizure**

IRC § 6334(a)(13) provides that the principal residence of a taxpayer is generally exempt from levy, except as provided in subsection (e). IRC § 6334(e) provides that a principal residence shall not be exempt from levy if a judge or magistrate of a U.S. district court "approves (in writing) the levy of such residence." An administrative seizure is generally subject to significant taxpayer protections. Among them, IRC § 6343(a) requires the IRS to release a levy under certain circumstances, including where it determines that the levy "is creating an economic hardship due to the financial condition of the taxpayer."<sup>2</sup> The government must show that "the taxpayer's other assets subject to collection are insufficient to pay the amount due,"<sup>3</sup> and that "no reasonable alternative exists for collection of a taxpayer's debt."<sup>4</sup> In addition, if the property to be levied is owned by the taxpayer but is used as the principal residence of the taxpayer's spouse, the taxpayer's former spouse, or the taxpayer's minor child, the government will send a letter to each such person providing notice of the commencement of the proceeding. The letter will be addressed in the name of the taxpayer's

1 Chief Counsel Directives Manual 34.6.2.2(1), Foreclosure of the Tax Lien (06-12-2012); *see also* Internal Revenue Manual (IRM) 5.17.4.8.2.1, Administrative Collection Devices Are Not Feasible or Adequate (Mar. 25, 2022).

2 IRC § 6343(a)(1)(D).

3 IRC § 6334(e).

4 Treas. Reg. § 301.6334-1(d)(1). This requirement in the regulations is consistent with the legislative history of section 6334(e), which states that a principal residence "should only be seized to satisfy tax liability as a last resort." S. REP. No. 105-174, at 86-87 (1998).

spouse or ex-spouse, individually or on behalf of any minor children. If it is unclear who is living in the principal residence property and/or what such person's relationship is to the taxpayer, a letter will be addressed to "Occupant."<sup>5</sup>

### Lien Foreclosure Suit

IRC § 7403 authorizes the Department of Justice (DOJ) to file a civil action against a taxpayer in a U.S. district court to enforce a tax lien and foreclose on a taxpayer's property. There is no exclusion for property consisting of a taxpayer's principal residence. As compared with administrative seizures, statutory taxpayer protections are considerably more limited in lien foreclosure suits. For example, the Supreme Court has held: "We can think of virtually no circumstances ... in which it would be permissible to refuse to authorize a sale simply to protect the interests of the delinquent taxpayer himself or herself."<sup>6</sup> A court has some discretion to refuse to authorize a sale that would impact a spouse, children, or other third parties, but even in that circumstance, the discretion is limited.<sup>7</sup> Further, there is no requirement the IRS establish that "no reasonable alternative exists for collection of a taxpayer's debt" or that the IRS notify the taxpayer's spouse, former spouse, or family unless they have an ownership interest in the property to be foreclosed.

### REASONS FOR CHANGE

IRC § 6334(e), requiring judicial approval of the administrative sale of principal residences, was enacted as part of the IRS Restructuring and Reform Act of 1998. The Senate Finance Committee report stated that the "seizure of the taxpayer's principal residence is particularly disruptive to the occupants," and a principal residence therefore "should only be seized to satisfy tax liability as a last resort."<sup>8</sup>

This code section provided protections to taxpayers subject to administrative seizures of principal residences but offered no such protections to taxpayers subject to judicial foreclosures of principal residences. While the IRS may prefer one procedure over the other depending on the circumstances, from a taxpayer's standpoint there is no meaningful difference between these two actions. A foreclosure in this circumstance has the same devastating impact as an administrative seizure. The end result is that the taxpayer's principal residence is sold, and the proceeds are applied to his or her tax liability.<sup>9</sup> Both groups of taxpayers deserve the same protections, as do their families.

At the recommendation of the Office of the Taxpayer Advocate, the IRS has written procedures into its Internal Revenue Manual (IRM) that provide additional taxpayer protections before a case may be referred to DOJ for the filing of a lien foreclosure suit.<sup>10</sup> The IRM prescribes certain initial steps IRS employees must take, such as attempting to identify the occupants of a residence and advising the taxpayer about Taxpayer Advocate Service assistance options. It also sets forth an internal approval process prior to referring a lien enforcement case to DOJ. However, the IRM is simply a set of instructions to IRS staff. Taxpayers generally may not rely on IRM violations as a basis for challenging IRS actions in court, and the IRS may modify or rescind IRM provisions at any time.

<sup>5</sup> Treas. Reg. § 301.6334-1(d)(3).

<sup>6</sup> *United States v. Rodgers*, 461 U.S. 677, 709 (1983).

<sup>7</sup> *Id.* at 680, 709-710.

<sup>8</sup> S. REP. NO. 105-174, at 86-87 (1998).

<sup>9</sup> For example, in *United States v. Maris*, 109 A.F.T.R.2d 2012-775, 2012-1 USTC ¶ 50,182 (D. Nev. 2012), the court issued an order denying a request to lien foreclose on a principal residence because the government had not established that no reasonable alternative existed for collection of the taxpayer's debt. The court reconsidered this order when the government pointed out that this requirement only applied to an order approving an administrative seizure and sale under IRC § 6334(e). *United States v. Maris*, 2013 WL 3200079, 111 A.F.T.R.2d 2013-2475, 2013-2 USTC ¶ 50,403 (D. Nev. 2013). From the standpoint of protecting a taxpayer's rights, the considerations of either cause of action are identical. There is no reason to afford fewer taxpayer protections in one circumstance than the other.

<sup>10</sup> See IRM 5.17.4.8.2.5, Lien Foreclosure on a Principal Residence (Mar 25, 2022); IRM 5.17.12.20.2.2.4, Additional Items for Lien Foreclosure of Taxpayer's Principal Residence (May 24, 2019); IRM 25.3.2.4.5.2(3), Actions Involving the Principal Residence of the Taxpayer (Nov. 24, 2021).

Because of the devastating impact the seizure of a taxpayer's principal residence may have on the taxpayer and his or her family, the National Taxpayer Advocate believes taxpayer protections from lien foreclosure suit referrals should be codified and not left for the IRS to determine through IRM procedures.

## RECOMMENDATIONS

- Amend IRC § 7403 to codify current IRM administrative protections, including that an IRS employee must receive executive-level written approval to proceed with a lien foreclosure suit referral.
- Amend IRC § 7403 to preclude IRS employees from requesting that DOJ file a civil action in a U.S. district court seeking to enforce a tax lien and foreclose on a taxpayer's principal residence, except where the employee has determined that:
  - (1) The taxpayer's other property or rights to property, if sold, would be insufficient to pay the amount due, including the expenses of the proceedings, and no reasonable alternative exists for collection of a taxpayer's debt;
  - (2) The foreclosure and sale of the residence would not create an economic hardship due to the financial condition of the taxpayer; and
  - (3) If the property to be levied is owned by the taxpayer but is used as the principal residence of the taxpayer's spouse, the taxpayer's former spouse, or the taxpayer's minor child, the IRS has sent a notice addressed in the name of the taxpayer's spouse or ex-spouse, individually or on behalf of any minor children.<sup>11</sup>

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<sup>11</sup> For legislative language generally consistent with this recommendation, see Small Business Taxpayer Bill of Rights Act, H.R. 1828, 114th Cong. § 16 (2015); Small Business Taxpayer Bill of Rights Act, S. 949, 114th Cong. § 16 (2015); and Eliminating Improper and Abusive IRS Audits Act, S. 2215, 113th Cong. § 8 (2014).

**Legislative Recommendation #24****Provide Collection Due Process Rights to Third Parties Holding Legal Title to Property Subject to IRS Collection Actions****SUMMARY**

- *Problem:* When the IRS takes collection action against a taxpayer, the taxpayer is entitled to a collection due process (CDP) hearing at which he or she may raise defenses, challenge the appropriateness of the collection action, and propose collection alternatives. In some cases, the IRS may take collection action against third parties who are liable to pay the tax. These third parties are not entitled to a CDP hearing, giving them less procedural protection than the taxpayer who owes the tax.
- *Solution:* Clarify that affected third parties who hold legal title to property subject to IRS collection actions are entitled to CDP protections to the same extent as the taxpayers who owe the tax.

**PRESENT LAW**

Current law authorizes the IRS to file a Notice of Federal Tax Lien (NFTL) against and levy upon (seize) all property or rights to property of “any person liable to pay any tax” who neglects or refuses to do so, including property owned by certain third parties (individuals or entities). These third parties include nominees, alter egos, and persons to whom lien-encumbered property is transferred (collectively, “affected third parties”).<sup>1</sup> In connection with taking these collection actions, the Secretary must provide CDP rights to “the person described in section 6321” (in the case of liens) and to “any person with respect to any unpaid tax” before levying against property (in the case of levies).<sup>2</sup>

**REASONS FOR CHANGE**

Congress created the CDP notice and hearing procedures to give taxpayers the right to a meaningful hearing before the IRS levies their property or immediately after the IRS files an NFTL against their property. During a CDP hearing with the IRS Independent Office of Appeals (Appeals), a taxpayer has the opportunity and right to raise defenses, challenge the appropriateness of collection actions, and propose collection alternatives. If the parties cannot otherwise resolve the issue, Appeals may issue an adverse Notice of Determination that is subject to review in the U.S. Tax Court and that may thereafter be appealed to the U.S. Courts of Appeals.

For purposes of CDP eligibility, the Treasury regulations interpret the statutory term “person” as including only the taxpayer (*i.e.*, the person upon whom the tax was imposed and who refused or neglected to pay following notice and demand). Thus, affected third parties are not afforded CDP rights.<sup>3</sup>

In some affected third-party circumstances, the IRS seeks to collect from specific property (*e.g.*, encumbered property that has been transferred to a third party, whether or not as a nominee). In other cases, the IRS seeks

<sup>1</sup> See IRC §§ 6323(f) and 6331(a).

<sup>2</sup> IRC §§ 6320(a)(1) and 6331(d)(1). See also IRC §§ 6321, 6322, 6323(a), 6323(f), 6323(h)(6), and 6331(a). IRC § 6321 also refers to “any person liable to pay any tax.” A CDP lien notice will only be given to the person described in IRC § 6321 who is named on the NFTL. Treas. Reg. § 301.6320-1(a)(2) Q&A-A1. A CDP levy notice will only be given to the person described in IRC § 6331(a). Treas. Reg. § 301.6330-1(a)(3) Q&A-A1.

<sup>3</sup> See Treas. Reg. §§ 301.6320-1(a)(2) Q&A-A7, 301.6330-1(a)(3) Q&A-A2, 301.6320-1(b)(2) Q&A-B5, and 301.6330-1(b)(2) Q&A-B5. This interpretation is inconsistent in some respects with the stated congressional intent, and the Treasury Department could have interpreted the statute otherwise. The CDP regime was enacted by the IRS Restructuring and Reform Act of 1998, and in explaining CDP rights, the accompanying conference report referred to “[t]he taxpayer (or affected third party).” In addition, CDP levy rights are statutorily afforded to “persons” and are neither limited to taxpayers nor to persons who originally neglected or refused to pay the tax. The term “taxpayer” is defined in IRC § 7701(a)(14) as “any person subject to any internal revenue tax,” which in this context arguably may include affected third parties, given that the IRS is seeking to collect from them. H.R. REP. NO. 105-599, at 264 (1998) (CONF. REP.).



to collect from all property of the affected third party (e.g., an alter ego).<sup>4</sup> In both situations, the IRS may file NFTLs that identify the affected third party and levy upon property that, under state law, belongs to the affected third party.

The current collection regime, including the available remedies for alleged nominees, alter egos, and persons to whom encumbered property is transferred, is costly, unduly burdensome, inefficient, and lacks adequate procedural safeguards. A third party may seek administrative review of the nominee/alter ego/lien determination by requesting a Collection Appeal Program (CAP) hearing through Appeals. However, a CAP hearing only provides a summary review, since Appeals' goal is to decide CAP cases within five days.<sup>5</sup> While Appeals' goal of quickly resolving CAP cases is laudable, the rights of the third party utilizing a CAP appeal can be adversely affected. In addition, no judicial appeal from an adverse Appeals decision is permitted in a CAP case. All CAP decisions are final.<sup>6</sup>

The available judicial remedies require filing in federal district court, which is difficult to navigate without legal representation and is therefore costly for both third parties and the government.<sup>7</sup> Some third parties who cannot afford the significant expense and burden of litigation may never be able to challenge an inappropriate or unlawful collection action.

In pre-pandemic years, the IRS generally issued over 1.5 million CDP notices to taxpayers, tens of thousands of taxpayers requested CDP hearings, and over a thousand taxpayers filed CDP petitions in the U.S. Tax Court.<sup>8</sup> By comparison, the IRS generally filed fewer than 1,000 nominee and alter ego NFTLs annually when TAS last obtained data.<sup>9</sup> Thus, expressly providing CDP rights to affected third parties would not impose an undue administrative burden on the IRS. Rather, it would save resources for both the government and the affected third parties by reducing litigation costs.

For these reasons, the National Taxpayer Advocate believes it is incongruous and inequitable for taxpayers who originally were responsible for tax debts to receive the full protection of IRC §§ 6320 and 6330, while third parties holding legal title to property that makes them currently subject to IRS collection actions do not receive these due process protections.

## RECOMMENDATION

- Amend IRC §§ 6320 and 6330 to extend CDP rights to affected third parties who hold legal title to property subject to IRS collection actions.<sup>10</sup>

4 See *Oxford Capital Corp. v. U.S.*, 211 F.3d 280, 284 (5th Cir. 2000); Internal Revenue Manual (IRM) 5.17.2.5.7(2), Property Held by Third Parties (Jan. 8, 2016).

5 IRM 8.24.1.3.8, Case Procedures under CAP (Sept. 28, 2021).

6 *Hughes v. Comm'r*, T.C. Memo. 2012-42; IRM 8.24.1.2, Distinctions Between CAP and Collection Due Process (CDP) Hearings (Sept. 28, 2021).

7 For example, if the IRS has filed an NFTL, the third party who holds the title is left with the option to bring an action to quiet title under 28 U.S.C. § 2410 in district court. To contest a nominee, alter ego, or transferee levy, the affected third party must file a wrongful levy action under IRC § 7426 in district court.

8 In addition, we identified 70,481 business taxpayers that requested CDP hearings in FY 2022. IRS Compliance Data Warehouse (CDW), Business Master File Transaction History table (FY 2022); IRS CDW, Individual Master File Transaction History table (FY 2022). The total number of CDP petitions filed in the Tax Court was compiled by the IRS Office of Chief Counsel and totaled 1,181 (Nov. 4, 2022). IRS, Counsel Automated Tracking System, Subtype DU. Inventory pending as of September 30, 2021. This data does not include cases on appeal. The IRS has taken fewer collection actions since the start of the COVID-19 pandemic, and CDP requests have therefore been lower over the last two years.

9 IRS response to TAS information request (Oct. 7, 2022).

10 For more detail, see National Taxpayer Advocate 2012 Annual Report to Congress 544 (Legislative Recommendation: Amend IRC §§ 6320 and 6330 to Provide Collection Due Process Rights to Third Parties (Known as Nominees, Alter Egos, and Transferees) Holding Legal Title to Property Subject to IRS Collection Actions), <https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/Legislative-Recommendations-The-IRS-Should-Provide-Collection-Due-Process-Rights-to-Third-Parties-Holding-Property.pdf>.

**Legislative Recommendation #25****Extend the Time Limit for Taxpayers to Sue for Damages for Improper Collection Actions****SUMMARY**

- *Problem:* Both taxpayers and the government benefit when the IRS has an opportunity to consider a taxpayer's claim to recover damages for improper collection actions before the taxpayer files suit in court, but current filing deadlines in some cases require taxpayers to file suit in court before the IRS has a chance to consider their claims.
- *Solution:* Give taxpayers more time to file suit in court if they have filed a timely administrative claim with the IRS.

**PRESENT LAW**

IRC § 7433(a) authorizes taxpayers harmed by improper collection actions to sue the United States for damages if an IRS employee has recklessly or intentionally, or by reason of negligence, disregarded any provision of the tax code or any regulation relating to the collection of federal tax. Under IRC § 7433(d)(3) and Treas. Reg. § 301.7433-1(g)(2), the suit must be brought in a U.S. district court within two years from the date on which the taxpayer had a reasonable opportunity to discover all essential elements of a possible cause of action.

Before a taxpayer may sue the United States, IRC § 7433(d)(1) requires the taxpayer to file an administrative claim with the IRS. Treas. Reg. § 301.7433-1(d) provides that a taxpayer generally may not file suit in court until the earlier of (i) the date six months after filing an administrative claim or (ii) the date on which the IRS renders a decision on the claim. However, if the claim is filed within the last six months of the two-year period for filing suit, the taxpayer may file suit in court at any time before expiration of the two-year period.

**REASONS FOR CHANGE**

IRC § 7433(d)(1) reflects a policy decision that it is generally in the best interests of both the taxpayer and the government to allow the IRS to consider and render a decision on a taxpayer's claim before a case is brought to court. If a case is resolved at the administrative level, both parties are spared the time and expense of litigation. Treas. Reg. § 301.7433-1(d) reflects a complementary policy decision that if the IRS does not render a decision on an administrative claim within six months, taxpayers should be able to bring their cases to court without having to wait indefinitely for an IRS decision.

The existing rules, however, do not always achieve the goal of allowing the IRS to consider and render a decision before suit is filed. For example, while a claim is pending at the administrative level, the two-year period for filing suit in a U.S. district court continues to run. If a taxpayer files an administrative claim during the final six months of the two-year period, the taxpayer may be forced to file suit in a U.S. district court before the IRS has an opportunity to render a decision on the administrative claim (or else will forfeit the right to do so).

To give the IRS an opportunity to render an administrative decision while preserving the taxpayer's right to challenge an adverse decision in court, the two-year period that commences when the right of action accrues should be tied to the deadline for filing an administrative claim (rather than the deadline for filing suit). Specifically, if the IRS renders an adverse or partially adverse decision on a timely filed administrative claim, the taxpayer should be allowed to file suit within two years from the date of the IRS's decision (*i.e.*, similar to the time allowed for filing suit after a refund claim is denied).

At the same time, to ensure taxpayers do not have to wait indefinitely for an IRS decision, a taxpayer should be permitted to file suit in a U.S. district court if a timely filed administrative claim goes unanswered for six months. These rules would ensure the IRS has a full six-month period to consider and render a decision on a taxpayer's damages claim based on an alleged improper collection action while preserving the taxpayer's right to file suit if the IRS does not render a timely decision.

## RECOMMENDATION

- Amend IRC § 7433(d)(3) to allow taxpayers who file an administrative claim with the IRS within two years from the date a right of action accrues to file a civil action in a U.S. district court (i) no earlier than six months from the date on which the administrative claim was filed and (ii) no later than two years from the date on which the IRS sends its decision on the administrative claim to the taxpayer by certified or registered mail.<sup>1</sup>

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<sup>1</sup> The Taxpayer Bill of Rights Enhancement Act of 2017 would have amended IRC § 7433(d)(3) to replace the requirement that taxpayers bring suit within two years of the date the cause of action accrues with a requirement that a suit be commenced by *"the later of the date on which administrative remedies available within the Internal Revenue Service have been exhausted or the date on which the taxpayer reasonably could have discovered that the actions of the officer or employee were done in disregard of a provision of this title or any regulation promulgated under this title."* S. 1793, 115th Cong. § 201(c) (2017), and S. 1578, 114th Cong. § 301 (2015) (emphasis added). This proposed change would prevent taxpayers from being forced to file suit before the IRS has had the opportunity to render a decision on the administrative claim and is thus generally consistent with this recommendation. However, the recommendation we are making would also preserve the IRC § 7433(d)(1) requirement that taxpayers must file an administrative claim before they can bring suit in a U.S. district court and is thus more comprehensive.

**Legislative Recommendation #26****Revise the Private Debt Collection Rules to Eliminate the Taxpayers Intended to Be Excluded by the Taxpayer First Act****SUMMARY**

- *Problem:* The tax code prohibits the IRS from utilizing private companies to collect the tax debt of any taxpayer with adjusted gross income (AGI) of 200 percent or less of the Federal poverty level. The IRS currently determines AGI by relying exclusively on a taxpayer's last-filed tax return, going back up to ten years. However, collectibility determinations are normally made on the basis of the taxpayer's current financial condition, and a tax return filed ten years ago is not a reliable measure of a taxpayer's current financial condition.
- *Solution:* Direct the IRS to determine AGI based on third-party information reporting documents (e.g., Forms W-2 and 1099) if no return has been filed in the last two years.

**PRESENT LAW**

IRC § 6306 directs the Secretary to enter into qualified tax collection contracts with private collection agencies (PCAs) to collect certain "inactive tax receivables."<sup>1</sup> Subsection (d) lists categories of collection cases that are not eligible for assignment to PCAs.

The Taxpayer First Act (TFA) added the following category to the list:<sup>2</sup>

[A] taxpayer who is an individual with adjusted gross income, as determined for the most recent taxable year for which such information is available, which does not exceed 200 percent of the applicable poverty level (as determined by the Secretary).

**REASONS FOR CHANGE**

The IRS has implemented the exclusion for taxpayers with adjusted gross incomes that do not exceed 200 percent of the Federal Poverty Level in a manner that fails to identify those taxpayers accurately. It has chosen to rely exclusively on a filed tax return, even if the taxpayer has not filed a recent return. Rather than using alternative means to determine the taxpayer's current AGI (e.g., third-party information reporting documents like Forms W-2 and 1099), the IRS reaches back up to *ten years* to locate a return to determine AGI.

This approach produces anomalous results. A taxpayer who could afford to pay tax ten years ago may not be able to do so today – and these are the cases Congress intended to exclude from assignment to PCAs. Conversely, a taxpayer who could not afford to pay tax ten years ago might have earned additional income or acquired additional assets and now be able to make payments.

*Example:* A taxpayer last filed a tax return in 2012 when he earned \$60,000. In 2013, he retired due to age or disability. He did not pay his tax liability and still has a balance due. Since 2012, his income has consisted solely of Social Security benefits, and he has not had a filing obligation. Under its current approach, the IRS will look at the taxpayer's 2012 tax return, determine the taxpayer's income is above 200 percent of the Federal Poverty Level, and assign his case to a PCA. Yet this is a case the TFA sought to exclude from assignment to a PCA.

<sup>1</sup> IRC § 6306(a) & (c).

<sup>2</sup> TFA, Pub. L. No. 116-25, § 1205, 133 Stat. 981, 989 (2019) (adding IRC § 6306(d)(3)(F)).

By contrast, if the same taxpayer earned only \$30,000 in 2012, and third-party information reports show he earned \$100,000 in 2019, the case might not be assigned to a PCA under the IRS's approach, even though the taxpayer can make payments currently.

To ensure that collectibility determinations are made based on current data, the National Taxpayer Advocate has recommended that the IRS utilize information on a tax return if one has been filed in the last two years and, if not, that the IRS compute AGI from the information reporting documents the IRS receives.<sup>3</sup>

If the IRS relies on information reporting documents, it will have to use gross income rather than AGI because it may not know for which adjustments a taxpayer qualifies, if any. In some cases, that may have the effect of overestimating a taxpayer's AGI and therefore assigning some cases to PCAs that should have been excluded. Even so, we believe that basing collectibility determinations on recent information will be far more accurate than reaching back for information up to ten years old.<sup>4</sup>

The Treasury Inspector General for Tax Administration (TIGTA) reached a similar conclusion and has similarly recommended that the IRS consider using "both last return filed information and third-party income information in its methodology to exclude low-income taxpayers from PCA inventory."<sup>5</sup>

## RECOMMENDATION

- Amend IRC § 6306(d)(3)(F) to direct the IRS to determine an individual's adjusted gross income "for the most recent taxable year for which such information is available" by reference to the individual's most recently filed tax return if one has been filed in the preceding two years or, if not, by reference to information reporting documents described in part III of subchapter A of chapter 61 of the Internal Revenue Code.

3 No method will be perfect. If the IRS uses third-party information reporting documents to make collectibility determinations, income not reported on those documents, such as self-employment income, will not be taken into account. But that is likely to be true even when the IRS relies on filed tax returns, as tax gap studies show most income not reported to the IRS on third-party documents is not reported on tax returns, either. See IRS Pub. 1415, Federal Tax Compliance Research: Tax Gap Estimates for Tax Years 2014-2016, at 20 (Oct. 2022), <https://www.irs.gov/pub/irs-pdf/p1415.pdf>. This study estimated the net misreporting percentage (NMP) of income subject to little or no information reporting is 55 percent. The NMP is roughly equivalent to the percentage of income that goes unreported. Prior tax gap studies have shown, as one would expect, that the nonreporting percentage is higher for income subject to no information reporting than income subject to little information reporting.

4 A data run the IRS performed to compare the method the IRS is using with the method TAS has proposed found it would exclude roughly the same number of taxpayers. Cases assigned to PCAs as of September 12, 2019, were matched to the Individual Returns Transaction File to determine the last individual income tax return filed and to the Information Returns Master File to determine current income reported by third-party payors. For the reasons described above, we believe the TAS approach would do a better job of identifying the taxpayers whom Congress intended to exclude.

5 Treasury Inspector General for Tax Administration, Ref. No. 2021-30-010, *Fiscal Year 2021 Biannual Independent Assessment of Private Collection Agency Performance* 20 (Dec. 2020).

## REFORM PENALTY AND INTEREST PROVISIONS

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### Legislative Recommendation #27

## Convert the Estimated Tax Penalty Into an Interest Provision to Properly Reflect Its Substance

### SUMMARY

- *Problem:* If a self-employed individual or business fails to pay sufficient estimated tax during the year, the IRS will impose an addition to tax that is computed as an interest charge but classified as a penalty. The term “penalty” implies that the individual or business has engaged in improper conduct, yet small businesses often experience significant fluctuations in their incomes and expenses from year to year that make it difficult for them to accurately estimate their tax liabilities.
- *Solution:* Reclassify the addition to tax for underpaying estimated tax as an interest charge (rather than a penalty).

### PRESENT LAW

Through the combination of wage withholding and estimated tax payments, the IRC aims to ensure that federal income and payroll taxes are paid ratably throughout the year. IRC § 3402 generally requires employers to withhold tax on wages paid to employees. For many employees, wage withholding covers their tax liabilities in full. But taxpayers who are self-employed and taxpayers who have investment income typically are not subject to withholding on this “non-wage” income and instead must make estimated tax payments.

IRC § 6654 generally requires individual taxpayers to pay at least the lesser of (i) 90 percent of the tax shown on a tax return for the current tax year or (ii) 100 percent of the tax shown on a tax return for the preceding tax year (reduced by the amount of wage withholding) in four installment payments due on April 15, June 15, September 15, and January 15 of the following tax year.<sup>1</sup> IRC § 6655 generally requires corporate taxpayers to pay at least 100 percent of the tax shown on a tax return for the current tax year or, in some cases, 100 percent of the tax shown on a tax return for the preceding tax year in four installment payments due on April 15, June 15, September 15, and December 15.

IRC §§ 6654(a) and 6655(a) provide that a taxpayer who fails to pay sufficient estimated tax will be liable for a penalty that is computed by applying (i) the underpayment rate established under IRC § 6621(ii) to the amount of the underpayment (iii) for the period of the underpayment. IRC § 6621 is an interest provision. Therefore, the additional amount a taxpayer owes for failing to pay sufficient estimated tax is computed as an interest charge, even though it is denominated as a “penalty.”

### REASONS FOR CHANGE

For a variety of reasons, taxpayers often have difficulty predicting how much tax they will owe. Self-employed taxpayers or taxpayers who own small businesses may experience significant fluctuations in their incomes and expenses from year to year. Similarly, taxpayers with sizable investment income may experience significant fluctuations. In addition, substantial changes in tax laws, such as those that took effect in 2018, affect tax

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<sup>1</sup> If the adjusted gross income of a taxpayer for the preceding tax year exceeds \$150,000, “110 percent” is substituted for “100 percent” in applying clause (ii). IRC § 6654(d)(1)(C).

liabilities in ways that taxpayers may not fully anticipate. As a result, millions of taxpayers do not satisfy the requirements of IRC § 6654 and are liable for penalties each year, even though many have attempted to comply. Corporate taxpayers face similar challenges.

The term “penalty” carries negative connotations, and the National Taxpayer Advocate believes it should be reserved for circumstances in which a taxpayer has failed to make reasonable efforts to comply with the law. Thus, she agrees with the assessment of the House Committee on Ways and Means when it wrote during a previous Congress: “Because the penalties for failure to pay estimated tax are calculated as interest charges, the Committee believes that conforming their title to the substance of the provision will improve taxpayers’ perceptions of the fairness of the estimated tax payment system.”<sup>2</sup>

The Office of the Taxpayer Advocate has conducted research studies that have found “tax morale” has an impact on tax compliance.<sup>3</sup>

When the IRS imposes a “penalty” on a taxpayer, there is a strong implication that the taxpayer has engaged in improper conduct. For that reason, penalties generally should be subject to waiver for reasonable cause. Under current law, the estimated tax penalty cannot be waived. Thus, an individual who experiences a fire, flood, heart attack, or other exigent circumstance that precludes payment by the estimated tax deadline will still be “penalized.” This is not good for “tax morale.” If the addition to tax is recharacterized as an interest charge designed solely to compensate the government for the time value of money, it would be easier to justify imposing it without waiver.

## RECOMMENDATIONS

- Recharacterize the penalty for failure to pay sufficient estimated tax as an interest charge – which is the basis for the calculation of the addition to tax. Toward that end, relocate IRC §§ 6654 and 6655 from part I of subchapter A of chapter 68 to the end of subchapter C of chapter 67 and make conforming modifications to the headings and text.<sup>4</sup>
- If a failure to pay sufficient estimated tax continues to be treated as a penalty, enact a reasonable cause exception so that the penalty will not apply when a payment is late due to circumstances beyond the taxpayer’s control, such as a fire, flood, or medical condition that makes compliance impractical.<sup>5</sup>

<sup>2</sup> H.R. REP. NO. 108-61, at 23-24 (2003).

<sup>3</sup> See National Taxpayer Advocate 2013 Annual Report to Congress vol. 2, at 1-13 (Research Study: *Do Accuracy-Related Penalties Improve Future Reporting Compliance by Schedule C Filers?*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2013-ARC\\_VOL-2-1.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2013-ARC_VOL-2-1.pdf).

<sup>4</sup> For legislative language generally consistent with this recommendation, see Taxpayer Protection and IRS Accountability Act, H.R. 1528, 108th Cong. § 101 (2003).

<sup>5</sup> For more detail on our recommendation to enact a reasonable cause exception if the additional charge for failure to pay estimated tax remains a penalty, see National Taxpayer Advocate 2008 Annual Report to Congress vol. 2, at 34-36 (Research Study: *A Framework for Reforming the Penalty Regime*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/08\\_tas\\_arc\\_vol2.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/08_tas_arc_vol2.pdf).



**Legislative Recommendation #28****Apply One Interest Rate Per Estimated Tax Underpayment Period****SUMMARY**

- *Problem:* The due dates for estimated tax payments and the dates on which the interest rate for estimated tax underpayments are adjusted do not align. As a result, more than one interest rate may apply for a single estimated tax underpayment period, causing unnecessary complexity and burden for taxpayers.
- *Solution:* Apply the interest rate established on the first day of a calendar quarter to any underpayment that begins during that calendar quarter.

**PRESENT LAW**

IRC § 6654(c) provides that taxpayers who make estimated tax payments must submit those payments on or before April 15, June 15, September 15, and January 15 of the following tax year. Similarly, IRC § 6655(c) provides that corporations required to make installment payments must submit those payments on or before April 15, June 15, September 15, and December 15.<sup>1</sup> Failure to make required estimated tax payments results in a penalty that is determined by the underpayment rate, the amount of the underpayment, and the period of the underpayment.

Under IRC § 6621(a)(2), the underpayment rate is equal to the federal short-term interest rate, plus three percentage points. Under IRC § 6621(b)(1), the federal short-term interest rate is determined quarterly by the Secretary of the Treasury. If the Secretary determines a change in the federal short-term interest rate, the change is effective on January 1, April 1, July 1, and October 1.

**REASONS FOR CHANGE**

Under current law, more than one interest rate may apply for a single estimated tax underpayment period. Calculations are typically required to cover 15-day periods. For example, if a taxpayer fails to make an estimated tax payment due June 15 and the Secretary determines a change in the federal short-term interest rate effective July 1, one interest rate would apply for the period from June 16 through June 30, and the rate would be subject to adjustment on July 1. A change in interest rate just 15 days after the estimated tax underpayment period begins causes unnecessary complexity and burden for taxpayers. This complexity and burden would be reduced if a single interest rate were applied for each period.

**RECOMMENDATION**

- Amend IRC §§ 6654 and 6655 to provide that the underpayment rate for any day during an estimated tax underpayment period shall be the underpayment rate established by IRC § 6621 for the first day of the calendar quarter in which the underpayment period begins.<sup>2</sup>

<sup>1</sup> To make compliance easier, the National Taxpayer Advocate has recommended that Congress set the estimated tax payment deadlines 15 days after the end of each calendar quarter (April 15, July 15, October 15, and January 15). See National Taxpayer Advocate 2022 Purple Book 16, *Adjust Individual Estimated Tax Payment Deadlines to Occur Quarterly*, [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2022/01/ARC21\\_PurpleBook\\_02\\_ImproveFiling\\_7.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2022/01/ARC21_PurpleBook_02_ImproveFiling_7.pdf).

<sup>2</sup> For legislative language generally consistent with this recommendation, see Taxpayer Bill of Rights Enhancement Act of 2017, S. 793, 115th Cong. § 305 (2017). If this proposal is adopted, repeal of IRC § 6621(b)(2)(B) may be required. See also H.R. REP. NO. 108-61, at 25 (2003); Taxpayer Protection and IRS Accountability Act, H.R. 1528, 108th Cong. § 101 (2003).

**Legislative Recommendation #29****Pay Interest to Taxpayers on Excess Payments of Estimated Tax to the Same Extent Taxpayers Must Pay a Penalty on Underpayments of Estimated Tax****SUMMARY**

- *Problem:* The government charges taxpayers interest for underpayments of estimated tax, but it does not pay taxpayers interest for overpayments of estimated tax. In both perception and reality, this incongruity is one-sided and unfair.
- *Solution:* Require the government pay interest on overpayments of estimated tax to the same extent as it charges taxpayers interest for underpayments of estimated tax.

**PRESENT LAW**

Through wage withholding and estimated tax payments, Congress aims to ensure that taxes are prepaid ratably throughout the year. IRC § 3402 generally requires employers to withhold tax on wages paid to employees. IRC § 6654(g) provides that income taxes withheld from wages are deemed paid in equal amounts on the estimated tax installment due dates throughout the year unless the taxpayer establishes the dates on which the amounts were withheld.

IRC §§ 6654 and 6655 generally require individual and corporate taxpayers, respectively, to prepay their tax in four installment payments. A taxpayer who fails to pay enough estimated tax will be liable for a “penalty” determined at a rate that is roughly equal to the interest rate on an underpayment under IRC § 6621 beginning on the date the estimated tax payment was due. However, the government does not pay interest on excess estimated tax payments made by taxpayers.

IRC § 6621(a) provides that the overpayment and underpayment rates are generally the federal short-term rate, plus three percentage points (or two percentage points for corporations).<sup>1</sup> IRC § 6611(b)(2) provides that the government is, in practice, generally entitled to a grace period of up to 30 days before it has to pay interest. IRC § 6611(b)(3) provides that if a return is late, the government does not pay interest for any day before it is filed.

**REASONS FOR CHANGE**

There are at least three good reasons for the government to pay interest on excess estimated tax payments. First, it would be reciprocal and fair. The government effectively charges interest on estimated tax underpayments.<sup>2</sup> It seems one-sided that it does not pay interest on estimated tax overpayments.

Second, paying interest could improve voluntary tax compliance. Tax professionals routinely advise taxpayers that it is foolish to make excess estimated tax payments because they are, in effect, giving the government an

1 Corporations receive a lower overpayment rate to the extent their overpayments exceed \$10,000 and are charged a higher underpayment rate to the extent their underpayments exceed \$100,000. IRC § 6621(a)(1)(B) & (c)(1). To the extent that interest is payable on equivalent underpayments and overpayments made by the same taxpayer, however, the net rate of interest is zero. IRC § 6621(d).

2 Technically, amounts the government charges for tax underpayments are denominated as penalties pursuant to IRC §§ 6654(a) (individuals) and 6655 (corporations), but the amounts are computed by reference to IRC § 6621, which is an interest provision. For a recommendation to convert the estimated tax penalty into an interest provision, see *Convert the Estimated Tax Penalty Into an Interest Provision to Properly Reflect Its Substance*, *supra*.

interest-free loan.<sup>3</sup> But it is difficult for taxpayers to estimate exactly how much they should pay. A telephone survey found approximately two-thirds of individual taxpayers with balances due did not plan to owe a balance upon filing.<sup>4</sup>

Notably, taxpayers who owe a balance upon filing are more likely than others to understate their tax liabilities.<sup>5</sup> In tax year 2020, nearly 30 percent of such taxpayers with a balance due failed to pay it in full.<sup>6</sup> Thus, if encouraging excess estimated tax payments reduces underpayments, it should improve both reporting and payment compliance.

Third, paying estimated tax overpayment interest would provide an additional incentive for taxpayers to file timely to avoid forfeiting the interest on a late-filed return pursuant to IRC § 6611(b)(3). Therefore, it might also help to improve filing compliance.

## RECOMMENDATION

- Amend IRC § 6621 to pay interest on excess estimated tax payments at the overpayment rate beginning on the due date of the payments. If Congress wishes to minimize the budget impact of this recommendation, it could cap the excess estimated tax payment amount that will bear interest for each taxpayer on an annual basis.

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3 See, e.g., Aimee Picchi, *Tax season 2020: Most Americans Don't Understand How Tax Refunds Work, and It Might Cost Them*, USA TODAY, Dec. 30, 2019.

4 See Wage and Investment Division (W&I), Research Group 5, Project No. 5-03-06-2-028N, Experimental Tests of Remedial Actions to Reduce Insufficient Prepayments: Effectiveness of 2002 Letters 7 (Jan. 16, 2004), *citing* W&I Customer Research Group 5, Causes and Potential Treatments for Underwithholding and Insufficient Estimated Payments (2000).

5 Charles Christian, Phoenix District Office of Research and Analysis, *The Association Between Underwithholding and Noncompliance* 1-2 (July 14, 1995) (finding that “[o]n average, understated tax on balance due returns is ten times as large as understated tax on other returns”).

6 IRS, Compliance Data Warehouse, Individual Returns Transaction File and Individual Master File Status History tables (data as of Oct. 27, 2022).

**Legislative Recommendation #30****Extend Reasonable Cause Defense for the Failure-to-File Penalty to Taxpayers Who Rely on Return Preparers to E-File Their Returns****SUMMARY**

- *Problem:* A taxpayer who fails to file a tax return by the deadline is subject to a late-filing penalty unless the taxpayer can demonstrate “reasonable cause” for the failure. In 1985, the Supreme Court held that reliance on a tax return preparer to file a return cannot constitute “reasonable cause” for a late filing because the taxpayer had a responsibility to ensure the deadline was met. While that conclusion may be appropriate in the context of paper-filed returns, where a taxpayer can mail the return himself, it is not appropriate in the context of e-filed returns, where the preparer typically submits the return and the taxpayer cannot easily verify whether a return has been filed (and accepted).
- *Solution:* Allow taxpayers who rely on tax return preparers to e-file their returns to receive “reasonable cause” relief from the failure-to-file penalty.

**PRESENT LAW**

IRC § 6651 imposes an addition to tax when a taxpayer fails to file a return by the return due date, unless the taxpayer can show the failure was due to reasonable cause and not due to willful neglect (hereinafter, the “failure-to-file penalty”).<sup>1</sup> Reasonable cause exists when a taxpayer has exercised ordinary business care and prudence but was unable to file the return within the prescribed time.<sup>2</sup>

In *United States v. Boyle*, the Supreme Court held that a taxpayer’s reliance on an agent to file a return did not constitute “reasonable cause” for late filing.<sup>3</sup> In *Boyle*, the tax return at issue was filed on paper. At least two U.S. district courts have ruled that the *Boyle* holding applies in the e-filing context as well.<sup>4</sup>

In the IRS Restructuring and Reform Act of 1998, Congress adopted a policy that “paperless filing should be the preferred method and most convenient means of filing Federal tax and information returns” and gave the Secretary broad authority to incentivize taxpayers to file returns electronically.<sup>5</sup>

IRC § 6011(e)(3) authorizes the Secretary to require tax return preparers to file returns electronically unless they reasonably expect to file ten or fewer individual income tax returns during a calendar year. Treas. Reg. § 301.6011-7 implements this requirement.

**REASONS FOR CHANGE**

At the time *Boyle* was decided, all tax returns were filed on paper. Taxpayers generally could fulfill the basic responsibility of mailing returns to the IRS themselves, even when they engaged tax professionals to prepare them. In ruling that the taxpayer in *Boyle* was not entitled to “reasonable cause” abatement as a matter of

1 IRC § 6651(a)(1). The penalty amount is five percent of the tax due for each month or partial month the return is late, up to a maximum of 25 percent. The penalty increases to 15 percent per month up to a maximum of 75 percent if the failure to file is fraudulent. IRC § 6651(f).

2 Treas. Reg. § 301.6651-1(c)(1). See also Internal Revenue Manual (IRM) 20.1.1.3.2, Reasonable Cause (Nov. 21, 2017).

3 *Boyle*, 469 U.S. 241 (1985).

4 See, e.g., *Haynes v. United States*, 119 A.F.T.R.2d (RIA) 2202 (W.D. Tex. 2017), *vacated and remanded*, *Haynes v. United States*, 760 F. App’x 324 (5th Cir. 2019); *Intress v. United States*, 404 F. Supp. 3d 1174 (M.D. Tenn. 2019).

5 Pub. L. No. 105-206, § 2001, 112 Stat. 685, 723 (1998); IRC § 6011(f).

law, the Supreme Court stated that “[i]t requires no special training or effort to ascertain a deadline and make sure that it is met.”<sup>6</sup>

In effect, the *Boyle* decision concluded that the duty to file a return is non-delegable. While that rule may make sense in a paper-filing context, it is not reasonable to apply it in the e-filing context. Today, most taxpayers effectively delegate the electronic filing of their returns to preparers or use software providers. Particularly when a taxpayer uses a preparer, the taxpayer is generally several steps removed from the filing process. When a preparer e-files a tax return, he or she must transmit it through an electronic return originator (typically, a software company) to the IRS. Thus, there are four parties sequentially involved in this chain: (i) the taxpayer; (ii) the preparer; (iii) the software company; and (iv) the IRS. If the IRS rejects an e-filed tax return, it generally sends a notification back through the software company to the preparer, but it will not notify the taxpayer directly.<sup>7</sup> In these circumstances, there is no practical way for a taxpayer to ensure his or her return has been properly submitted by the preparer and accepted by the IRS. In addition, the IRS rejects e-filed returns before processing for a wide variety of reasons, and unlike with paper filing, a return that is e-filed with the IRS but rejected is not treated as timely filed.

While Treasury regulations generally require tax return preparers to e-file client returns, the regulations exempt preparers from the e-filing requirements if a taxpayer provides the preparer with “a hand-signed and dated statement” that says the taxpayer chooses to file a paper return.<sup>8</sup> This “opt-out” may reduce a taxpayer’s risk of incurring a failure-to-file penalty. In light of the congressional directive to incentivize e-filing, it makes little sense for the government to tell taxpayers, in effect, that they can reduce their risk of incurring a failure-to-file penalty by filing their returns on paper.<sup>9</sup>

In *Haynes v. United States*, a married couple employed a certified public accountant to prepare and file their joint tax return.<sup>10</sup> The preparer timely e-filed the return, but the IRS did not accept it for processing because a taxpayer identifying number was listed on the wrong line. The preparer did not receive a rejection notice from the IRS. The preparer notified the taxpayers that their return had been timely filed. Ten months later, the IRS notified the taxpayers that their return had not been received and asserted the failure-to-file penalty.

The taxpayers requested penalty abatement for reasonable cause, asserting that they had sought to file their return timely, that their preparer had transmitted the return timely, and that both the preparer and the taxpayers believed the return had been received. The taxpayers argued that *Boyle* should not apply in the context of electronic filing because the complexities of e-filing vastly exceed the comparatively simple and verifiable task of mailing a return. The IRS rejected the taxpayers’ position, and the taxpayers then paid the penalty and filed a refund suit in a U.S. district court. The district court concluded that the holding in *Boyle* applies to e-filed returns to the same extent as paper-filed returns and ruled in the government’s favor as a matter of law. On appeal, the U.S. Court of Appeals for the Fifth Circuit vacated and remanded the district court’s decision on the ground that there was a genuine issue of material fact about whether it was reasonable for the preparer to assume, based on the IRS’s silence, that it had accepted the taxpayers’ return. However, the appeals court did not take a position on the *Boyle* issue of whether the taxpayers’ reliance on a preparer to e-file their tax return constituted reasonable cause for a failure-to-file.<sup>11</sup>

6 *Boyle*, 469 U.S. at 252.

7 IRM 3.42.5.7.2(1), Form 1040 Online Filing (Oct. 10, 2018).

8 Treas. Reg. § 301.6011-7(a)(4)(iii).

9 For context, over half of all individual income tax returns filed during 2022 were prepared by professionals and e-filed (nearly 85 million returns). See IRS 2022 Filing Season Statistics (week ending Oct. 28, 2022), <https://www.irs.gov/newsroom/filing-season-statistics-for-week-ending-october-28-2022>.

10 119 A.F.T.R.2d (RIA) 2202 (W.D. Tex. 2017).

11 *Haynes v. United States*, 760 F. App’x 324 (5th Cir. 2019). The government subsequently conceded the case, but it has not conceded the *Boyle* issue. See Keith Fogg, *Reliance on Preparer Does Not Excuse Late E-Filing of Return*, PROCEDURALLY TAXING BLOG (Sept. 4, 2019), <https://procedurallytaxing.com/reliance-on-preparer-does-not-excuse-late-e-filing-of-return>.

In 2019, a different U.S. district court reached a conclusion similar to the decision by the district court in *Haynes*.<sup>12</sup>

The issue in these cases is not whether the failure-to-file penalty is applicable in the first instance. Based on the wording of the statute, there is no doubt the penalty is applicable if the return is filed late. Rather, the issue is whether taxpayers are entitled to request abatement of the penalty on “reasonable cause” grounds. Because the *Boyle* decision used relatively sweeping language, lower courts have seemingly felt bound to apply its holding in the context of e-filed returns, notwithstanding the significant differences between paper filing and electronic filing.

While the bright-line rule embodied in *Boyle* is convenient for the IRS to administer, the nearly automatic assessment of the failure-to-file penalty for e-filed returns deemed late (often where the return was submitted timely by the taxpayer or preparer but rejected by the IRS) is grossly unfair and undermines the congressional policy that e-filing be encouraged. The American College of Tax Counsel shares this view and submitted a compelling *amicus curiae* brief in the appeal of the *Haynes* decision.<sup>13</sup>

## RECOMMENDATION

- Amend IRC § 6651 to specify that reasonable cause relief may be available to taxpayers that use return preparers to submit their returns electronically and direct the Secretary to issue regulations specifying what constitutes ordinary business care and prudence for e-filed returns.

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<sup>12</sup> *Intress v. United States*, 404 F. Supp. 3d 1174 (M.D. Tenn. 2019).

<sup>13</sup> See Brief of American College of Tax Counsel (Nov. 27, 2017), [https://www.actconline.org/wp-content/uploads/2018/02/ACTC\\_Amicus\\_Brief\\_Haynes.pdf](https://www.actconline.org/wp-content/uploads/2018/02/ACTC_Amicus_Brief_Haynes.pdf).

**Legislative Recommendation #31****Authorize a Penalty for Tax Return Preparers Who Engage in Fraud or Misconduct by Altering a Taxpayer's Tax Return****SUMMARY**

- *Problem:* When a corrupt tax return preparer steals from a client or from the public fisc, the government's enforcement options are limited. The Justice Department may bring criminal charges, but it lacks the resources to do so except in cases of widespread, high-dollar schemes. The alternative is civil penalties, but the law currently does not authorize meaningful civil penalties.
- *Solution:* Authorize the IRS to impose greater civil penalties in a wider range of cases.

**PRESENT LAW**

IRC § 6694(b) authorizes the IRS to impose a penalty when a tax return preparer has understated a tax liability on a "return or claim for refund" and the understatement is due to willful or reckless conduct.<sup>1</sup> IRC § 6695(f) imposes a \$500 penalty (adjusted for inflation) on a preparer who negotiates a taxpayer's refund check.<sup>2</sup>

**REASONS FOR CHANGE**

TAS has handled hundreds of cases involving return preparer fraud or misconduct. In the most common scenario, a taxpayer visits a preparer to get his tax return prepared, the preparer completes the return while the taxpayer is present, and the preparer alters the return after the taxpayer leaves before submitting it to the IRS. In some cases, the items of income, deduction, and credit are accurate, but the preparer alters the direct deposit routing information so that the entire refund is directed to the preparer's account instead of the taxpayer's account. In other cases, the preparer increases the refund amount and elects a "split refund,"<sup>3</sup> so the taxpayer receives the refund amount he expects and the additional amount goes to the preparer.

The Department of Justice (DOJ) may bring criminal charges against preparers who alter tax returns, but resource constraints generally preclude criminal charges except in cases of widespread schemes. In addition, the dollar amount of a refund obtained by a preparer in these cases often will determine whether DOJ pursues an erroneous refund suit under IRC § 7405, also due to resource constraints.<sup>4</sup> It is therefore important that the IRS have the authority to impose sizeable civil tax penalties against preparers who alter tax returns without the knowledge or consent of taxpayers.

Under current law, the IRS has very limited authority to impose civil penalties in instances of preparer fraud or misconduct. The IRC § 6694 penalty generally will not apply to either of the scenarios described above for the following reasons:

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- 1 The amount of the penalty is per return or claim for refund and is equal to the greater of \$5,000 or 75 percent of the income derived (or to be derived) by the tax return preparer with respect to the return or claim.
  - 2 Similarly, Section 10.31 of Circular 230 (31 C.F.R. Part 10) prohibits a tax practitioner who prepares tax returns from endorsing or negotiating a client's federal tax refund check.
  - 3 Taxpayers can split their refunds among up to three accounts at a bank or other financial institution. See IRS Form 8888, Allocation of Refund (Including Savings Bond Purchases) (2019). The instructions to Form 8888 specifically advise taxpayers not to deposit their refunds into their tax return preparer's account.
  - 4 See Internal Revenue Manual (IRM) 21.4.5.15(6), Collection Methods for Category D Erroneous Refunds (Oct. 1, 2007) ("The erroneous refund suit is limited to amounts that exceed the litigating threshold established by the Department of Justice.").



- When a preparer has altered items of income, deduction, or credit in an attempt to increase a taxpayer's refund after the taxpayer has reviewed and approved the return for filing, the IRS Office of Chief Counsel has concluded that the resulting document is not a valid "return."<sup>5</sup> As a consequence, the IRC § 6694 penalty does not apply.
- When a preparer has altered only the direct deposit information on the return and has not changed the tax liability, there is no understatement of tax.

In addition, it is unclear whether the IRC § 6695(f) penalty applies. Treasury regulations have interpreted the IRC § 6695(f) penalty as applicable to a preparer who negotiates "a check (including an electronic version of a check)."<sup>6</sup> Although the IRS's internal procedures currently treat direct deposits as subject to the IRC § 6695(f) penalty, the tax code and regulations do not make clear whether a "direct deposit" is legally identical to an "electronic version of a check."<sup>7</sup> Moreover, even if the penalty is applicable, the penalty amount for 2022 of \$560<sup>8</sup> is typically small in relation to the size of refunds that some preparers have misappropriated and does not serve as a deterrent.

The National Taxpayer Advocate recommends the IRS be given the authority to impose civil penalties on tax return preparers who engage in fraud or misconduct by altering the return of a taxpayer for personal financial gain.

## RECOMMENDATIONS

- Amend IRC § 6694(b) so the penalty the IRS may assess against a tax return preparer for understating a taxpayer's liability is broadened beyond tax returns and claims for refund by adding the words "and other submissions purporting to be returns."
- Amend IRC § 6695 to (i) explicitly cover a preparer who misappropriates a taxpayer's refund by changing the direct deposit information and (ii) increase the dollar amount of the penalty to deter preparers from engaging in this type of fraud or misconduct. To make the public fisc whole, the penalty should be equal to 100 percent of the amount a preparer has improperly converted to his own use by altering a taxpayer's tax return.

5 IRS, Program Manager Technical Advice (PMTA) 2011-20, Tax Return Preparer's Alteration of a Return (June 27, 2011); PMTA 2011-13, Horse's Tax Service (May 12, 2003).

6 Treas. Reg. § 1.6695-1(f)(1).

7 See IRM 20.1.6.5.6, Negotiation of Check – IRC 6695(f) (Oct. 13, 2021).

8 Rev. Proc. 2021-45, 2021-48 I.R.B. 764.

## Legislative Recommendation #32

## Clarify That Supervisory Approval Is Required Under IRC § 6751(b) Before Proposing Penalties

### SUMMARY

- *Problem:* By statute, some penalties require supervisory approval. However, the statute leaves the timing of this approval unclear. This statutory ambiguity has generated conflicting decisions among the courts, which leaves taxpayers lacking certainty about how they should be treated by the IRS.
- *Solution:* Clarify that supervisory approval is required before a proposed penalty is communicated in written form to a taxpayer.

### PRESENT LAW

IRC § 6751(b)(1) provides: “No penalty under this title shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination or such higher level official as the Secretary may designate.” IRC § 6751(b)(2) carves out two categories of exceptions from this supervisory approval requirement: (i) the additions to tax for failure to file a tax return or pay the tax due (IRC § 6651) and the additions to tax for failure to pay sufficient estimated tax (IRC §§ 6654 and 6655) and (ii) any other penalty that is “automatically calculated through electronic means.”

### REASONS FOR CHANGE

IRC § 6751(b) protects taxpayers’ *right to a fair and just tax system* by ensuring that penalties are only imposed in appropriate circumstances and are not used as a bargaining chip to encourage settlement.<sup>1</sup> However, the phrase “initial determination of [an] assessment” is unclear. A “determination” is made based on the IRS’s investigation of the taxpayer’s liability and an application of the penalty statutes. An “assessment” is merely the entry of a decision on IRS records. Therefore, while a penalty can be determined and a penalty can be assessed, “one cannot ‘determine’ an ‘assessment.’”<sup>2</sup> Due to this ambiguity in the statute, an increasing number of courts have had to grapple with when written supervisory approval must be provided.<sup>3</sup> In recent years, courts have come to various conclusions about when the supervisory approval must occur:

- In 2016, the Tax Court held in *Graev v. Commissioner* (which was later vacated) that supervisory approval for penalties subject to deficiency procedures could take place at any point before the assessment was made.<sup>4</sup>
- In 2017, the U.S. Court of Appeals for the Second Circuit held in *Chai v. Commissioner* that supervisory approval was required for penalties subject to deficiency procedures no later than the date on which the IRS issued the notice of deficiency, or if the penalty was asserted through an answer or amended answer, the time of that filing.<sup>5</sup>

1 See S. REP. NO. 105-174, at 65 (1998).

2 *Chai v. Comm’r*, 851 F.3d 190, 218-19 (2d Cir. 2017) (quoting *Graev v. Comm’r*, 147 T.C. 460 (2016) (Gustafson, J., dissenting)).

3 See National Taxpayer Advocate 2019 Annual Report to Congress 149-157 (Most Litigated Issue: *Accuracy-Related Penalty Under IRC § 6662(b)(1) and (2)*, [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC19\\_Volume1\\_MLI\\_03\\_Accuracy.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC19_Volume1_MLI_03_Accuracy.pdf)); National Taxpayer Advocate 2018 Annual Report to Congress 447-457 (Most Litigated Issue: *Accuracy-Related Penalty Under IRC § 6662(b)(1) and (2)*, [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/07/ARC18\\_Volume1\\_MLI\\_01\\_AccuracyRelatedPenalty.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/07/ARC18_Volume1_MLI_01_AccuracyRelatedPenalty.pdf))).

4 147 T.C. at 460, *superseded by, in part, modified by, in part*, 149 T.C. 485 (2017).

5 851 F.3d 190 (2d Cir. 2017).

- In 2019, the Tax Court held in *Clay v. Commissioner* that supervisory approval for penalties subject to deficiency procedures was required prior to sending the taxpayer a formal communication that included the right to go to the IRS Independent Office of Appeals.<sup>6</sup>
- In 2020, the Tax Court followed *Clay* and held in *Laidlaw's Harley Davidson Sales, Inc. v. Commissioner* that the same timing rule applied to assessable penalties. That decision was overruled by the U.S. Court of Appeals for the Ninth Circuit in 2022.<sup>7</sup> There, the Ninth Circuit held that approval must be obtained before assessment of the penalty or, if earlier, before the relevant supervisor loses discretion to approve the penalty assessment.

In *Belair Woods LLC v. Commissioner*, the Tax Court found the IRS did not have to obtain supervisory approval before sending the taxpayer a Letter 1807, TEFRA Partnership Cover Letter for Summary Report, which invited the taxpayer to a closing conference to discuss proposed adjustments.<sup>8</sup> Instead, the court found that Letter 1807 only advised the taxpayer of the possibility that the penalties could be proposed, and the pivotal moment requiring supervisory approval was when the IRS sent the 60-day letter, formally communicating its definite decision to assert the penalties.

In September 2020, the IRS issued interim guidance that instructs employees to obtain written supervisory approval before sending a written communication that offers the taxpayer an opportunity to sign an agreement or consent to assessment or proposal of a penalty.<sup>9</sup> The interim guidance specifies that prior to obtaining written supervisory approval, employees can share written communications with the taxpayer that reflect proposed adjustments as long as they do not offer the opportunity to sign an agreement or consent to assessment or proposal of the penalty.

However, both *Belair Woods* and the IRS's interim guidance leave open the possibility that IRS employees could use penalties as a bargaining chip – precisely what Congress sought to prevent by enacting IRC § 6751(b). Under *Belair Woods*, IRS employees can propose penalties to induce a resolution without first obtaining written supervisory approval, as long as the communication is deemed a proposal and not a definite decision. This approach undermines the statutory intent because, as explained in the dissent in *Belair Woods*, “[e]very communication from the Commissioner proposing a deficiency and a related penalty – whether it is a preliminary report, a 30- or 60-day letter, or a notice of deficiency – sets forth proposed adjustments, which do not become final until a decision is entered or an assessment is properly recorded.”<sup>10</sup> The IRS's interim guidance seeks to resolve the question of what is merely a proposal versus a definite decision by drawing the line at written communications that offer a chance to agree to assessment or consent to proposal of a penalty. However, employees could still use penalties as a bargaining chip because some taxpayers may feel pressured to resolve their cases when penalties are first put on the table as proposed adjustments.

In addition to the timing issue, the statutory language of IRC § 6751(b)(1) is also problematic because of its focus on “assessment(s).” In *Wells Fargo & Company v. Commissioner*, the U.S. Court of Appeals for the Eighth Circuit found that supervisory approval under IRC § 6751(b) was not required because there was no assessment.<sup>11</sup> There, the IRS asserted the accuracy-related penalty in a refund suit to offset any refund granted to the taxpayer. Because the penalty, if upheld by the court, would only lead to a reduced refund

6 152 T.C. 223 (2019).

7 *Laidlaw's Harley Davidson Inc. v. Commissioner*, 29 F. 4th 1066 (9th Cir. 2022), *rev'g* 154 T.C. 68 (2020). See also *Kroner v. Comm'r*, No. 20-13902 (11th Cir. 2022), *rev'g* T.C. Memo. 2020-73, in which the Eleventh Circuit agreed with the Ninth Circuit's *Laidlaw's* decision. In *Carter v. Comm'r* (11th Cir. 2022), *rev'g* T.C. Memo. 2020-21, the Eleventh Circuit followed its decision in *Kroner*.

8 154 T.C. 1, Tax Ct. Rep. Dec. (RIA) 154.1 (Jan. 6, 2020).

9 Memorandum from Director, Examination Field and Campus Policy, to Directors, Field Examination, SBSE-04-0920-0054 (Sept. 24, 2020).

10 *Belair Woods, LLC v. Comm'r*, 154 T.C. 1, 11 (Jan. 6, 2020) (Marvel, J., dissenting).

11 957 F.3d 840 (8th Cir. 2020), *aff'g* 260 F. Supp. 3d 1140 (D. Minn. 2017).

and not a balance to be assessed, the court found there would be no assessment and thus no requirement for supervisory approval.

In practice, the overwhelming majority of penalties imposed by the IRS are excluded from the supervisory approval requirement through one of the exceptions in IRC § 6751(b)(1).<sup>12</sup> But where written supervisory approval is required, it should be required early enough in the process to ensure it is meaningful and is not merely an after-the-fact rubber stamp applied in the cases in which a taxpayer challenges a proposed penalty.

## RECOMMENDATION

- Amend IRC § 6751(b)(1) to clarify that no penalty under Title 26 shall be assessed or entered in a final judicial decision unless the penalty is personally approved (in writing) by the immediate supervisor of the individual making such determination or such higher level official as the Secretary may designate *prior to the first time the IRS sends a written communication to the taxpayer proposing the penalty as an adjustment.*

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<sup>12</sup> In fiscal year 2021, the IRS imposed 40.9 million penalties on individuals, estates, and trusts in connection with income tax liabilities. The following penalties, generally imposed by electronic means, accounted for nearly 80 percent of the total: failure-to-pay (17.0 million), failure-to-pay estimated tax (11.1 million), failure-to-file (3.4 million) and bad checks (1.0 million). IRS, 2021 Data Book, Table 26, Civil Penalties Assessed and Abated, by Type of Tax and Type of Penalty, Fiscal Year 2021, at 60 (2022).

**Legislative Recommendation #33****Require an Employee to Determine and a Supervisor to Approve All Negligence Penalties Under IRC § 6662(b)(1)****SUMMARY**

- *Problem:* The tax law generally requires supervisory approval before the IRS may assess a penalty, but it provides exceptions for certain penalties that may be automatically calculated and do not require employee judgment. The IRS currently takes the position that the negligence penalty may be automatically calculated and applied, but whether a taxpayer acted negligently requires an assessment of the taxpayer's conduct and state of mind, which a computer cannot make. As a result, the IRS is imposing the negligence penalty in some cases where the taxpayer was not negligent.
- *Solution:* Do not allow the IRS to impose the negligence penalty by computer without employee review and supervisory approval.

**PRESENT LAW**

IRC § 6662(b)(1) imposes a penalty equal to 20 percent of any underpayment of tax required to be shown on a tax return that is attributable to negligence or disregard of rules or regulations. IRC § 6662(c) defines “negligence” to include “any failure to make a reasonable attempt to comply with the provisions of this title” and “disregard” to include “any careless, reckless, or intentional disregard.”

IRC § 6751(b)(1) provides: “No penalty under this title shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination or such higher level official as the Secretary may designate.”<sup>1</sup> IRC § 6751(b)(2) carves out two categories of exception from this supervisory approval requirement: (i) the penalties for failure to file a tax return (IRC § 6651(a)(1)), failure to pay the tax due (IRC § 6651(a)(2)), and failure to pay sufficient estimated tax (IRC §§ 6654 and 6655) and (ii) any other penalty that is “automatically calculated through electronic means.”

**REASONS FOR CHANGE**

IRC § 6751 states that the initial determination of penalties must be personally approved (in writing) by the immediate supervisor of the individual making the initial determination, subject to the exceptions described above. In the significant majority of cases, the IRS imposes penalties by electronic means because it is easier and cheaper to do so.<sup>2</sup> Where the imposition of a penalty is mechanical, such as the penalties for failure to file, failure to pay, or failure to pay estimated tax, that approach is justifiable.

However, imposition of a penalty for “negligence or disregard of rules or regulations” is different. To assess whether a taxpayer made a “reasonable attempt to comply” with the law, an employee must assess the taxpayer's state of mind, the actions the taxpayer took to comply, and the taxpayer's motivations for taking those actions. A computer cannot do this.

<sup>1</sup> The meaning of “initial determination of such assessment” and the timing required for approval have been the subject of litigation. See, e.g., *Belair Woods v. Comm’r*, 154 T.C. No. 1, Tax Ct. Rep. Dec. (RIA) 154.1 (Jan. 6, 2020). For a recommendation to clarify the timing, see *Clarify That Supervisory Approval Is Required Under IRC § 6751(b) Before Proposing Penalties*, *supra*.

<sup>2</sup> In fiscal year 2021, the IRS imposed 40.9 million penalties on individuals, estates, and trusts in connection with income tax liabilities. The following penalties, generally imposed by electronic means, accounted for nearly 80 percent of the total: failure-to-pay (17.0 million), failure-to-pay estimated tax (11.1 million), failure-to-file (3.4 million) and bad checks (1.0 million). IRS, 2021 Data Book, Table 26, Civil Penalties Assessed and Abated, by Type of Tax and Type of Penalty, Fiscal Year 2021, at 60 (2022).

Nevertheless, Treas. Reg. § 1.6662-3(b)(1)(i) states that negligence is strongly indicated when a taxpayer omits income from an information return on his or her income tax return. In reliance on this regulation, the IRS has programmed its computers to calculate certain negligence penalties automatically as part of its Automated Underreporter (AUR) program. For example, the AUR system proposes the negligence penalty where IRS data suggests the taxpayer failed to report income reflected on a third-party information return for a second tax year in a row.<sup>3</sup>

Legal advice from the Office of Chief Counsel goes further, concluding that “in the absence of any other evidence suggesting the failure was not negligent, it is appropriate to propose and subsequently assess an accuracy-related penalty for negligence when a taxpayer does not include on an income tax return an amount of income shown on an information return.”<sup>4</sup>

However, the AUR system in this scenario solely checks for the presence of information returns and unreported income. It cannot determine there is no other evidence that would rebut the negligence finding, such as whether the information return was mailed to a different address than the one used by the taxpayer when filing the return or whether the information return contained an error. An employee must review the case to consider facts and circumstances that may suggest the taxpayer was not negligent.

Although the AUR program does require supervisory approval for the negligence penalty if the taxpayer submits a response,<sup>5</sup> there are many reasons a taxpayer may not respond. A taxpayer may have moved and not received the notice. A taxpayer may have put the notice aside and not replied before the response deadline. Or a taxpayer may have accepted the proposed tax adjustment without realizing that he or she must respond to avoid the penalty assessment.

In these and other circumstances, taxpayers may face a penalty for negligence without any analysis into their reasonable attempts to comply with tax laws. Allowing a computer to determine negligence without employee involvement harms taxpayers and undermines the protections afforded by IRC § 6751(b).

## RECOMMENDATION

- Amend IRC § 6751(b)(2)(B) to clarify that the exception for “other penalties automatically calculated through electronic means” does not apply to the penalty for “negligence or disregard of rules or regulations” under IRC § 6662(b)(1).

<sup>3</sup> Internal Revenue Manual (IRM) 4.19.3.22.1.4, Accuracy-Related Penalties (Sept. 21, 2020).

<sup>4</sup> IRS, Program Manager Technical Advice 2008-01249, Accuracy Related Penalties and Automated Underreporter Program (Oct. 22, 2007).

<sup>5</sup> IRM 4.19.3.22.1.4, Accuracy-Related Penalties (Sept. 21, 2020).

**Legislative Recommendation #34****Modify the Definition of “Willful” for Purposes of Finding Report of Foreign Bank and Financial Accounts Violations and Reduce the Maximum Penalty Amounts****SUMMARY**

- *Problem:* Penalties for failure to file international information returns or to disclose foreign assets are steep and grow even steeper when the IRS determines a taxpayer’s failure was “willful.” In addition, the IRS has become increasingly aggressive in asserting that taxpayers’ failures to file are willful, which leads to draconian penalties for good-faith errors.
- *Solution:* Increase the burden of proof on the IRS for declaring a failure “willful” and reduce the maximum penalty for willful violations.

**PRESENT LAW**

U.S. citizens, residents, or entities (collectively, U.S. taxpayers) with specified interests in foreign accounts exceeding \$10,000 in the aggregate during the year generally are required by 31 U.S.C. § 5314 and 31 C.F.R. § 1010.350 to report the accounts to the Financial Criminal Enforcement Network (FinCEN) in the Treasury Department. They must do so on FinCEN Form 114, Report of Foreign Bank and Financial Accounts (or FBAR). 31 U.S.C. § 5321(a)(5) imposes civil penalties for failing to report accounts. The amount of the penalty depends on whether the failure was “willful” or “non-willful.” The maximum penalty for a non-willful violation is \$10,000 (adjusted for inflation).<sup>1</sup> The maximum civil penalty for a willful violation is the greater of \$100,000 (adjusted for inflation) or 50 percent of “the balance in the account at the time of the violation.”<sup>2</sup> As currently interpreted by the IRS in non-binding policy guidance, 31 U.S.C. § 5321(a)(5)(B)(ii) will not allow for a penalty to be imposed for a non-willful violation if the account holder filed accurate or amended FBAR(s) rectifying prior violations and had reasonable cause for failing to file the FBAR(s).<sup>3</sup>

The IRS has created procedures that allow some account holders to correct non-willful noncompliance if they learn about the problem early. Under its Delinquent FBAR Submission Procedures and Streamlined Filing Compliance Procedures, the IRS will not impose a penalty (or will impose a penalty of five percent) for non-willful violations if an account holder reports the accounts on an FBAR and reports and pays tax on the income from the foreign financial accounts before being contacted by the IRS about an examination or FBAR violation.<sup>4</sup> Account holders who first learn of their FBAR violations when the IRS initiates an exam or contacts them about a violation are ineligible for these procedures.

1 31 U.S.C. § 5321(a)(5)(B)(i); 31 C.F.R. § 1010.821.

2 31 U.S.C. § 5321(a)(5)(C), (D)(ii). “The time of the violation” is the FBAR due date. Internal Revenue Manual (IRM) 4.26.16.5.2(2), FBAR Penalty Structure (June 24, 2021); IRM 4.26.16.5.5(3) Penalty for Willful FBAR Violations (June 24, 2021). See also *U.S. v. Schwarzbaum*, 24 F.4th 1355, 1365 (11th Cir. 2022).

3 The IRM provides that a penalty should not be imposed for a nonwillful violation if (1) the violation was due to reasonable cause; and (2) “[a]ccurate delinquent or amended FBAR(s) are filed, rectifying prior violation(s).” IRM 4.26.16.5.4(3), Penalty for Non-willful FBAR Violations (June 24, 2021).

4 Specifically, the Streamlined Filing Compliance Procedures require a combination of income tax, FBAR, and potentially international information return delinquent submissions in addition to a Title 26 miscellaneous offshore penalty. Delinquent FBAR Submission Procedures solely concern instances where a taxpayer/accountholder did report income from their foreign accounts on their income tax returns but did not file FBARs for those accounts. See IRS, Delinquent FBAR Submission Procedures, <https://www.irs.gov/individuals/international-taxpayers/delinquent-fbar-submission-procedures> (last visited Nov. 30, 2022) (no penalty if no underreporting and fixed before contact). See also IRS, Streamlined Filing Compliance Procedures, <https://www.irs.gov/individuals/international-taxpayers/streamlined-filing-compliance-procedures> (last visited Nov. 30, 2022).



## REASONS FOR CHANGE

The maximum FBAR penalty is among the harshest civil penalties the government may impose. For example, if an account holder maintains a balance of \$25,000 in a foreign account that he willfully fails to report, the IRS may impose a penalty of over \$100,000 per year and may go back six years, producing an aggregate statutory maximum penalty of over \$600,000.<sup>5</sup> Some commentators have suggested the penalty is so severe that it may violate the U.S. Constitution's prohibition against excessive fines.<sup>6</sup> Individuals who have lived in foreign countries or have immigrated to the United States often maintain foreign bank accounts and may overlook this requirement for benign reasons.

Although the IRM limits the total amount of the penalties for non-willful violations to 50 percent of the highest aggregate balance (HAB) of all unreported foreign financial accounts for all years under examination, examiners are still free to propose a penalty of up to 100 percent of the HAB for willful violations if a manager approves.<sup>7</sup> Even half the HAB can be more than the current balance if the account value has declined. Account holders have argued in many cases that the harshness of the maximum penalty, particularly the “willful” penalty, is disproportionate to the reporting failure.

While the distinction between willful and non-willful violations makes sense in concept, its application can lead to unduly harsh results. If the IRS chooses to assert a violation was willful, it is very difficult for a taxpayer to prevail. Schedule B of Form 1040, U.S. Individual Income Tax Return, asks if the taxpayer has a foreign account and references the FBAR filing requirement. Taxpayers are presumed to know the contents of their return when they sign it under penalty of perjury; the jurat they must sign states: “Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct and complete.”

It may be considered reckless or “willful blindness” for a taxpayer not to learn about the FBAR filing requirement after having been directed to the FBAR form by Schedule B and having signed the jurat.<sup>8</sup> For this reason, the government might reasonably argue (and a court might reasonably find) that *any* failure to file an FBAR form is willful where a taxpayer filed a federal tax return that included Schedule B.<sup>9</sup> Courts

<sup>5</sup> Under current guidance, the IRS should not impose such a severe penalty. See IRM 4.26.16.5.5, Penalty for Willful FBAR Violations (June 24, 2021) (discussed in the text below). See also IRM 4.26.16.5.3(7), Penalty for Willful FBAR Violations – Calculation (June 24, 2021) (“[i]n no event will the total penalty amount (among all open years) exceed 100 percent of the highest aggregate balance of all foreign financial accounts to which the violations relate during the years under examination.”). Note that the IRM is not binding on the IRS.

<sup>6</sup> See Alison Bennett, *New FBAR Penalty Limits Seen Reflecting IRS Concern on Eighth Amendment Litigation*, BNA TAX MGMT WEEKLY REPT (June 15, 2015). However, courts have held either that the FBAR penalties were not excessive or that the Eighth Amendment does not apply to them. See *U.S. v. Toth*, 2022 WL 1284015, at \*14 (1st Cir. 2022); *U.S. v. Bussell*, 699 F. App'x 695, 696 (9th Cir. 2017); *U.S. v. Kerr*, 2022 WL 912563, at \*10 (D. Ariz. 2022); *U.S. v. Schwarzbaum*, 2020 WL 2526500, at \*8 (S.D. Fla. 2020).

<sup>7</sup> See IRM 4.26.16.5.4.1, Penalty for Non-willful Violations – Calculation (June 24, 2021); IRM 4.26.16.5.5.3, Penalty for Willful FBAR Violations – Calculation (June 24, 2021). The IRS also has “mitigation” guidelines that could result in lower penalties. See IRM Exhibit 4.26.16-2, FBAR Penalty Mitigation Guidelines for Violations Occurring After October 22, 2004 (June 24, 2021). Commentators have suggested the IRS limited the maximum FBAR its examiners would propose to address concerns that the statutory maximums could violate the Excessive Fines clause of the Eighth Amendment to the Constitution. See, e.g., Alison Bennett, *New FBAR Penalty Limits Seen Reflecting IRS Concern on Eighth Amendment Litigation*, BNA TAX MGMT WEEKLY REPT (June 15, 2015).

<sup>8</sup> See, e.g., *Norman v. United States*, 942 F.3d 1111, 1115 (Fed. Cir. 2019).

<sup>9</sup> See, e.g., *United States v. Bohanec*, 263 F. Supp. 3d 881, 890 (C.D. Cal. 2016) (finding willful blindness, in part, because “Schedule B of Defendants’ 1998 tax return put them on notice that they needed to file an FBAR,” even though it was checked “yes” to indicate foreign accounts).

have arrived at different determinations when presented with this argument.<sup>10</sup> In practice, tax forms and instructions contain a lot of verbiage, and few if any taxpayers have a complete understanding of all lines, questions, and instructions on a return.

Account holders who do not file required FBAR forms due to negligence, inadvertence, or similar causes may be subject to penalties for non-willful violations (which have a reasonable cause exception). But they should not face uncertainty regarding possible application of the harsh penalties for “willful” violations. The National Taxpayer Advocate recommends Congress clarify that the IRS must prove a violation was “willful” without relying on the instructions to Schedule B or the failure to check the box on Schedule B before imposing a willful FBAR penalty and must do so by clear and convincing evidence – the standard typically required in fraud cases.<sup>11</sup>

## RECOMMENDATIONS

- Clarify that the government has the burden to establish willfulness by clear and convincing evidence before asserting a civil willful FBAR penalty and that the government cannot meet this burden by relying on the Schedule B attached to a return.
- Eliminate 31 U.S.C. § 5321(a)(5)(C)(i)(I), which would have the effect of narrowing the statutory maximum civil penalty for a willful FBAR violation to no greater than 50 percent of the balance in the account at the time of the violation so that a \$100,000 penalty is not imposed with respect to low-balance accounts.<sup>12</sup>

10 Compare *United States v. Bohanec, id., with United States v. Schwarzbaum*, 125 A.F.T.R.2d 2020-1323, 2020 WL 1316232 (S.D. Fla. 2020) (finding that willfulness could not be shown under a theory of constructive knowledge based on the signing of tax returns that included Schedule B where reasonable reliance on a tax preparer was present), subsequent determination, (11th Cir. 20-13989) 125 A.F.T.R.2d 2020-2109, 2020 WL 2526500 (S.D. Fla. 2020), *opinion amended*, (11th Cir. 20-13989) 126 A.F.T.R.2d 2020-5895, 2020 WL 5076979 (S.D. Fla. 2020), *vacated on other grounds and remanded*, 24 F.4th 1355, 2022-1 U.S. Tax Cas. (CCH) P 50107, 129 A.F.T.R.2d 2022-460 (11th Cir. 2022) and *appeal dismissed*, (11th Cir. 20-13989) (Nov. 25, 2020) and *appeal dismissed* (11th Cir. 20-13989) (Nov. 25, 2020).

11 In Tax Court, the IRS bears the burden of proving fraud by “clear and convincing” evidence. See Tax Court Rule 142(b) (“In any case involving the issue of fraud with intent to evade tax, the burden of proof in respect of that issue is on the [IRS], and that burden of proof is to be carried by clear and convincing evidence.”); IRM 25.1.6.2(3), Overview (June 10, 2021) (“Civil fraud penalties will be asserted when there is clear and convincing evidence that some part of the understatement of tax was due to fraud.”). However, U.S. district courts generally have not required the government to present “clear and convincing” evidence to prove willfulness in FBAR cases. *United States v. Garrity*, 304 F. Supp. 3d 267, 121 A.F.T.R.2d 2018-1342 (D. Conn. 2018); *United States v. Bohanec*, 263 F. Supp. 3d 881, 2016-2 U.S. Tax Cas. (CCH) P 50498, 118 A.F.T.R.2d 2016-6757 (C.D. Cal. 2016); *U.S. v. McBride*, 908 F. Supp. 2d 1186, 2012-2 U.S. Tax Cas. (CCH) P 50666, 110 A.F.T.R.2d 2012-6600 (D. Utah 2012); *U.S. v. Williams*, 2010-2 U.S. Tax Cas. (CCH) P 50623, 106 A.F.T.R.2d 2010-6150, 2010 WL 3473311 (E.D. Va. 2010), *judgment rev’d on other grounds*, 489 Fed. Appx. 655, 2012-2 U.S. Tax Cas. (CCH) P 50475, 110.

12 For more detail, see National Taxpayer Advocate 2014 Annual Report to Congress 331-345 (Legislative Recommendation: *Foreign Account Reporting: Legislative Recommendations to Reduce the Burden of Filing a Report of Foreign Bank and Financial Accounts (FBAR) and Improve the Civil Penalty Structure*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2014-ARC-VOL-1\\_S2\\_LR-6-508.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2014-ARC-VOL-1_S2_LR-6-508.pdf).

## STRENGTHEN TAXPAYER RIGHTS BEFORE THE OFFICE OF APPEALS

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### Legislative Recommendation #35

## Require Taxpayers' Consent Before Allowing IRS Counsel or Compliance Personnel to Participate in Appeals Conferences

### SUMMARY

- *Problem:* The IRS Independent Office of Appeals (Appeals) has adopted a policy, particularly in large cases, of including Counsel and Compliance personnel in taxpayer conferences, even if the taxpayer objects to their participation. Taxpayer rights are jeopardized and the independence of Appeals is compromised when Counsel or Compliance are permitted to attend conferences over the objections of taxpayers whose cases are nondocketed.
- *Solution:* Codify the right of taxpayers whose cases are nondocketed to an administrative appeal without the presence of personnel from Counsel or Compliance.<sup>1</sup>

### PRESENT LAW

Although the IRS had long operated an Office of Appeals under its administrative authority, Congress codified the office and retitled it the “Internal Revenue Service Independent Office of Appeals” as part of the Taxpayer First Act of 2019.<sup>2</sup> The intent of the provision was to “reassure taxpayers of the independence” of Appeals.<sup>3</sup>

Present law does not directly address the inclusion of personnel from the IRS Office of Chief Counsel or IRS compliance functions in conferences held by Appeals.<sup>4</sup>

### REASONS FOR CHANGE

Historically, Counsel and Compliance provided input into Appeals conferences via the case file and, if the case was particularly large or complex, at a pre-conference. The Appeals conference itself generally was devoted to presentation of the taxpayer’s case and settlement negotiations between the taxpayer (or the taxpayer’s representative) and the Appeals Officer. Counsel and Compliance personnel rarely attended such conferences, leaving taxpayers and Appeals Officers free to develop rapport, seek common ground, and pursue case resolution.<sup>5</sup>

<sup>1</sup> We are not recommending this change for cases that have been in the Tax Court. In docketed cases, the taxpayer has already filed a petition in the Tax Court seeking judicial review of an adverse IRS determination, and the Office of Chief Counsel has already become involved with the case in defending the IRS’s position.

<sup>2</sup> Taxpayer First Act, Pub. L. No. 116-25, § 1001, 133 Stat. 981, 983 (2019) (codified at IRC § 7803(e)).

<sup>3</sup> H.R. REP. NO. 116-39, pt. 1, at 29 (2019) (accompanying H.R. 1957, which was enacted into law without change to this provision as H.R. 3151). In 2012, the IRS published Revenue Procedure 2012-18, which, among other things, places parameters around *ex parte* communications between Appeals and other representatives of the IRS, such as Counsel and Compliance. This guidance is premised on the recognition that Appeals must be unbiased and impartial, both in fact and in appearance.

<sup>4</sup> IRC § 7803(e)(6)(B) provides the Chief of Appeals with authority to obtain legal assistance and advice from the staff of the IRS Office of Chief Counsel.

<sup>5</sup> For a more detailed discussion of this topic, see National Taxpayer Advocate 2019 Annual Report to Congress 62-68 (Most Serious Problem: Appeals: *The Inclusion of Chief Counsel and Compliance Personnel in Taxpayer Conferences Undermines the Independence of the Office of Appeals*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC19\\_Volume1\\_MSP\\_07\\_APPEALS.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC19_Volume1_MSP_07_APPEALS.pdf).

In October 2016, Appeals revised provisions of the Internal Revenue Manual (IRM) to allow Appeals Officers to include personnel from Counsel and Compliance in Appeals conferences as a matter of routine.<sup>6</sup> Counsel and Compliance are not a party to the actual settlement discussions, which occur near the conclusion of the conference, but they are typically given the opportunity to present an oral argument and question taxpayers and their representatives.

Under the revised procedures, an Appeals Officer may invite the additional participants regardless of whether taxpayers agree or object to their presence. Appeals has agreed to solicit and consider the views of taxpayers before inviting Counsel and Compliance to attend a conference but has stopped short of making taxpayer consent a prerequisite for such attendance.<sup>7</sup> Including Counsel and Compliance personnel in nondocketed cases without the consent of taxpayers contravenes the purpose of an independent Appeals conference, which is neither to give Compliance personnel another bite at the apple nor to transform Appeals into a mediation forum. Instead, the mission and credibility of Appeals rests on its ability to undertake direct and unbiased settlement negotiations with taxpayers and their representatives, independent of the Counsel and Compliance functions.

The expansion of Appeals conferences to routinely involve Counsel and Compliance personnel alters the relationship between taxpayers and Appeals Officers. It makes interactions less negotiation-based and transforms the conference into a more contentious and one-sided proceeding. This approach is also seemingly inconsistent with Congress's intent to "reassure taxpayers of the independence" of Appeals.

## RECOMMENDATION

- Amend IRC § 7803(e) to provide that a taxpayer shall have the right to a conference with the Independent Office of Appeals that does not include personnel from the Office of Chief Counsel or the compliance functions of the IRS in cases that have not been docketed in the Tax Court unless the taxpayer specifically consents to the participation of those parties in the conference.<sup>8</sup>

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<sup>6</sup> IRM 8.6.1.5.4, Participation in Conferences by IRS Employees (Oct. 1, 2016).

<sup>7</sup> IRS Independent Office of Appeals, Appeals Team Case Leader Conferencing Initiative: Summary of Findings and Next Steps (Sept. 2021).

<sup>8</sup> For legislative language generally consistent with this recommendation, see Protecting Taxpayers Act, S. 3278, 115th Cong. § 601 (2018). This recommendation is not intended to limit the ability of Appeals to obtain legal assistance and advice from the Office of Chief Counsel, as permitted by IRC § 7803(e)(6)(B).

## STRENGTHEN THE OFFICE OF THE TAXPAYER ADVOCATE

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### Legislative Recommendation #36

## Clarify That the National Taxpayer Advocate May Hire Legal Counsel to Enable Her to Advocate More Effectively for Taxpayers

### SUMMARY

- *Problem:* In analyzing legal issues that affect taxpayer rights and developing an independent position on matters that affect taxpayers both individually and collectively, the National Taxpayer Advocate often requires independent legal advice. Prior to 2015, the IRS permitted the National Taxpayer Advocate to hire her own attorneys. Since that time, the IRS has prohibited her from hiring attorneys, undermining her ability to do her job effectively.
- *Solution:* Authorize the National Taxpayer Advocate to hire attorneys who report directly to her.

### PRESENT LAW

Pursuant to 31 U.S.C. § 301(f), the General Counsel of the Department of the Treasury is the chief law officer for the Department. The IRS Chief Counsel is an Assistant General Counsel and the chief law officer for the IRS. With few exceptions, Treasury Department Order 107-04 provides that all attorneys in the Treasury Department must work in the Legal Division and report to the General Counsel.<sup>1</sup> Treasury's inspectors general and the Office of the Comptroller of the Currency (OCC) are excluded from this requirement based on specific statutory language in 5 U.S.C. App. III § 3(g) and 12 U.S.C. § 482, respectively, and therefore are authorized to hire and supervise their own attorneys.<sup>2</sup> No law specifically authorizes the National Taxpayer Advocate to hire and supervise attorneys.

IRC § 7803(c) makes clear, however, that TAS is expected to operate independently of the IRS in key respects. IRC § 7803(c)(2)(A) directs TAS to assist taxpayers in resolving problems with the IRS, to identify areas in which taxpayers have problems in their dealings with the IRS, and to make administrative and legislative recommendations to mitigate such problems. IRC § 7803(c)(4)(A) requires each local taxpayer advocate to notify taxpayers that its offices "operate independently of any other Internal Revenue Service office and report directly to Congress through the National Taxpayer Advocate." IRC § 7803(c)(2)(B)(iii) requires the National Taxpayer Advocate to submit reports to Congress directly "without any prior review or comment from ... the Commissioner, the Secretary of the Treasury, the Oversight Board, any other officer or employee of the Department of the Treasury, or the Office of Management and Budget." This provision is similar to the one that applies to the OCC (12 U.S.C. § 250).

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1 Treas. Order 107-04, states: "With the exception of persons employed by the Treasury Inspector General, TIGTA, SIGTARP, and the Chief Counsel of the Office of the Comptroller of the Currency, all attorneys whose duties include providing legal advice to officials in any office or bureau of the Department are part of the Legal Division under the supervision of the General Counsel."

2 The Inspector General Act of 1978 (codified as amended at 5 U.S.C. App. III § 3(g)), provides: "Each Inspector General shall, in accordance with applicable laws and regulations governing the civil service, obtain legal advice from a counsel either reporting directly to the Inspector General or another Inspector General." Similarly, 12 U.S.C. § 482 (2011) provides: "Notwithstanding any of the provisions of section 481 of this title or section 301(f)(1) of title 31 to the contrary, the Comptroller of the Currency shall, subject to chapter 71 of title 5, fix the compensation and number of, and appoint and direct, all employees of the Office of the Comptroller of the Currency."

When Congress reorganized the IRS in 1998, it recognized that the National Taxpayer Advocate requires independent counsel to advocate for her positions. The version of the IRS Restructuring and Reform Act of 1998 passed by the Senate contained the following authorization: “The National Taxpayer Advocate shall have the responsibility and authority to . . . appoint a counsel in the Office of the Taxpayer Advocate to report directly to the National Taxpayer Advocate.”<sup>3</sup> In explaining the provision, Senator Grassley said: “In order to make the Taxpayer Advocate more independent, which is what this bill does, it logically follows that the Taxpayer Advocate should have its own legal counsel.”<sup>4</sup>

This provision was not included in the final bill. However, the conference report stated that the “conferees intend that the National Taxpayer Advocate be able to hire and consult counsel as appropriate.”<sup>5</sup>

## REASONS FOR CHANGE

Since 2004, with the approval of the Commissioner of Internal Revenue, TAS has employed attorney-advisors. The National Taxpayer Advocate requires independent attorney-advisors because she often takes positions, both in working taxpayer cases and in systemic advocacy, that are directly contrary to the position of the IRS and the Office of Chief Counsel.

Once attorneys in the Office of Chief Counsel have adopted a legal position interpreting a law or regulation for purposes of IRS operations, procedures, or litigation, it would be unrealistic to expect that those same attorneys could effectively help the National Taxpayer Advocate develop a legal position that challenges their own interpretation or an interpretation adopted by the Chief Counsel organization for which they work. Notably, the Chief Counsel organization requires its attorneys to reconcile disputes internally so that they ultimately all “speak with one voice.”<sup>6</sup> Thus, although the National Taxpayer Advocate sometimes receives legal advice from Chief Counsel attorneys, the advice is not independent from the advice they provide to the rest of the IRS. By contrast, TAS’s own attorney-advisors have enabled the National Taxpayer Advocate to develop an independent perspective and advocate for taxpayers as the law intends.

In 2015, the IRS for the first time denied a routine TAS request to backfill existing attorney positions due to attrition. It cited Treasury Department General Counsel Directive No. 2, which states: “Except for positions in the Inspectors General offices or within the Office of the Comptroller of the Currency, attorney positions shall not be established outside of the Legal Division” unless the General Counsel or Deputy General Counsel(s) provides a waiver. On November 29, 2016, the National Taxpayer Advocate submitted a nine-page memo to the Acting General Counsel requesting permission to continue to hire attorney-advisors. It asked the Acting General Counsel to modify General Counsel Directive No. 2 to add a carve-out for the Office of the Taxpayer Advocate as it does for the Inspectors General offices. Alternatively, the National Taxpayer Advocate orally requested that a “waiver” be granted, as provided in the directive. In the fall of 2018, TAS submitted another hiring request, and it was again denied by the IRS.

3 H.R. 2676, 105th Cong. § 1102(a) (as passed by the Senate, May 7, 1998).

4 144 CONG. REC. S4460 (daily ed. May 7, 1998). The provision was added to the bill as an amendment sponsored by Senator Grassley on the Senate floor.

5 H.R. REP. NO. 105-599, at 216 (1998) (CONF. REP.). In 2003, the House passed legislation with nearly identical language. It would have authorized the National Taxpayer Advocate to “appoint a counsel in the Office of the Taxpayer Advocate to report solely to the National Taxpayer Advocate.” See Tax Administration and Good Government Act, H.R. 1528, 108th Cong. § 306 (2003) (as passed by the House, June 19, 2003). The legislation was sponsored by then-Cong. Rob Portman, who had previously been the lead House sponsor of the IRS Restructuring and Reform Act of 1998. It would have added this language as a new subsection (III) to IRC § 7803(c)(2)(D)(i). Although the authorization was not enacted into law, it bears mention that the Senate in 1998 and the House in 2003 approved virtually identical provisions of the legislation. That suggests the RRA 98 conference report language cited above had significant congressional support.

6 See Chief Counsel Directives Manual (CCDM) 35.4.1.4, Coordination with Other Counsel Offices (Feb. 7, 2013); CCDM 31.1.4.6, Reconciliation of Disputes (Aug. 11, 2004).



The inability of the National Taxpayer Advocate to hire attorney-advisors extends to announcing higher graded positions for attorneys currently working in TAS. Therefore, TAS is not only barred from hiring new attorneys, but well-performing attorneys cannot be promoted to higher-graded positions. This has accelerated attrition. If the National Taxpayer Advocate is not able to hire attorney-advisors, TAS's ability to advocate for taxpayers both individually and systemically and the National Taxpayer Advocate's ability to produce high-quality reports to Congress will be significantly compromised. The National Taxpayer Advocate believes the conference report language stating that the "conferees intend that the National Taxpayer Advocate be able to hire and consult counsel as appropriate" provides a sufficient legal basis for her to hire attorneys that report to her. The General Counsel has disagreed, maintaining that a statutory change is required.

## RECOMMENDATION

- Amend IRC § 7803(c)(2)(D) to expressly authorize the National Taxpayer Advocate to hire legal counsel that report directly to him or her.<sup>7</sup>

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7 For more detail, see National Taxpayer Advocate 2016 Annual Report to Congress 37-39 (Special Focus: *Provide the National Taxpayer Advocate the Authority to Hire Independent Counsel, Comment on Regulations, and File Amicus Briefs in Litigation Raising Taxpayer Rights Issues*, [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC16\\_Volume1\\_SpecialFocus.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC16_Volume1_SpecialFocus.pdf)) (recommending that Congress "[a]uthorize the National Taxpayer Advocate to appoint independent counsel who report directly to the National Taxpayer Advocate, provide independent legal advice, help prepare *amicus curiae* briefs and comments on proposed or temporary regulations, and assist the National Taxpayer Advocate in preparing the Annual Report to Congress and in advocating for taxpayers individually and systemically"); National Taxpayer Advocate 2002 Annual Report to Congress 198-215 (Legislative Recommendation: *The Office of the Taxpayer Advocate*, [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/arc2002\\_section\\_two.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/arc2002_section_two.pdf)). The Taxpayer and Fairness Protection Act of 2003, H.R. 1661, 108th Cong. § 335 (2003), would have authorized the National Taxpayer Advocate to "appoint a counsel in the Office of the Taxpayer Advocate to report solely to the National Taxpayer Advocate."



**Legislative Recommendation #37****Clarify the Authority of the National Taxpayer Advocate to Make Personnel Decisions to Protect the Independence of the Office of the Taxpayer Advocate****SUMMARY**

- *Problem:* To protect the independence of TAS, the tax code provides the National Taxpayer Advocate the authority to take independent personnel actions with respect to employees of local TAS offices. The tax code does not provide this authority with respect to national office TAS employees, yet national office TAS employees who advocate for systemic changes in IRS practices and policies are most likely to take positions in conflict with the IRS leadership and require personnel protection.
- *Solution:* Clarify that the National Taxpayer Advocate has the authority to take independent personnel actions with respect to all TAS employees.

**PRESENT LAW**

The IRS Restructuring and Reform Act of 1998 (RRA 98) included provisions to protect TAS's independence from other IRS functions. For example, IRC § 7803(c)(4)(A)(iii) requires local TAS offices to notify taxpayers that they “operate independently of any other Internal Revenue Service office and report directly to Congress through the National Taxpayer Advocate.” To bolster this independence, IRC § 7803(c)(2)(D) provides the National Taxpayer Advocate with the authority to “appoint” local taxpayer advocates in each state and to “evaluate and take personnel actions (including dismissal) with respect to any employee of any local office.”

The National Taxpayer Advocate's authority to make independent personnel decisions is discussed in the legislative history of RRA 98. The conference report states that the National Taxpayer Advocate “has the responsibility to evaluate and take personnel actions (including dismissal) with respect to *any local Taxpayer Advocate or any employee in the Office of the Taxpayer Advocate*.”<sup>1</sup> Thus, there is an inconsistency between the conference report and the statute. The conference report states the statute gives the National Taxpayer Advocate the authority to make independent personnel decisions regarding all TAS employees, while the statute confers that authority only regarding employees of TAS's local offices.

**REASONS FOR CHANGE**

IRC § 7803(c)(2)(A) assigns the National Taxpayer Advocate two principal responsibilities: (i) to advocate for taxpayers in specific cases (case advocacy) and (ii) to advocate for administrative and legislative changes to resolve problems that affect groups of taxpayers or all taxpayers (systemic advocacy). Although the conference report language indicates Congress intended to give the National Taxpayer Advocate independent personnel authority over employees engaged in both case advocacy and systemic advocacy functions, the statute as written only covers employees of local offices, who primarily are engaged in case advocacy. The National Taxpayer Advocate currently does not have independent personnel authority over TAS's senior leadership, TAS attorney-advisors, employees of TAS's systemic advocacy and research functions, and other national office employees, even though those employees are also charged with engaging in independent advocacy on behalf

1 H.R. REP. NO. 105-599, at 214 (1998) (CONF. REP.) (emphasis added). The report states that the conference committee adopted the Senate amendment with respect to the National Taxpayer Advocate provisions, except as modified. H.R. REP. NO. 105-599, at 216 (1998) (CONF. REP.). The Senate bill and report contained the same inconsistency as the conference bill and report. See H.R. 2676, 105th Cong. § 1102 (as passed by the Senate, May 7, 1998); S. REP. NO. 105-174, at 23 (1998).

of taxpayers, have the same potential conflicts, and face the same potential retaliatory personnel actions by the IRS leadership that Congress sought to address in 1998.

The rationale for giving the National Taxpayer Advocate the authority to make independent personnel decisions for TAS's national office employees is, in key respects, even stronger than the rationale for giving her that authority for local office employees. National office employees primarily advocate for systemic change, which often places them in direct conflict with senior officials in other parts of the IRS.

This concern is not merely theoretical. In recent years, peer executives at the IRS have reviewed and approved performance ratings for senior TAS leaders. This creates the potential for TAS leaders perceived as “team players” to receive better performance reviews and bonuses than TAS leaders who are perceived to be more aggressive in seeking changes in IRS policies or actions. For the same reasons that it would be inappropriate for IRS leaders to evaluate and make salary and bonus determinations for employees of the Treasury Inspector General for Tax Administration, the IRS's ability to affect the salary or bonuses of TAS's national office employees has the potential to undermine TAS's independent advocacy.

## RECOMMENDATION

- Amend IRC § 7803(c)(2)(D) to clarify that the National Taxpayer Advocate shall have the responsibility to evaluate and take personnel actions with respect to all employees of the Office of the Taxpayer Advocate.

**Legislative Recommendation #38****Clarify the Taxpayer Advocate Service's Access to Files, Meetings, and Other Information****SUMMARY**

- *Problem:* The IRS has occasionally refused to provide the National Taxpayer Advocate with information she requires to do her job of advocating for taxpayers and prevented TAS employees from attending IRS conferences with taxpayers who have open TAS cases and have requested TAS attendance.
- *Solution:* Require the IRS to give the National Taxpayer Advocate and her staff access to all IRS information relevant to TAS's duties and require the IRS to allow TAS case advocates to participate in taxpayer conferences when requested to do so by taxpayers.

**PRESENT LAW**

IRC § 7803(c)(2) requires TAS to assist taxpayers in resolving problems with the IRS, identify areas in which taxpayers are experiencing problems in their dealings with the IRS, make administrative and legislative recommendations to mitigate those problems, and annually report to Congress. IRC § 6103 generally prohibits the disclosure of tax returns or return information, but IRC § 6103(h) provides that "returns and return information shall, without written request, be open to inspection by or disclosure to officers and employees of the Department of the Treasury whose official duties require such inspection or disclosure for tax administration purposes."

Because TAS employees must review tax return information to fulfill their statutory duties, they are authorized by IRC § 6103(h) to do so. In furtherance of their duties, they may also need to attend meetings between taxpayers or their representatives and other IRS employees and obtain other information from the IRS. Similarly, the National Taxpayer Advocate requires information to analyze systemic problems and provide Congress with a "full and substantive analysis" of such problems in her annual reports to Congress, as required by IRC § 7803(c)(2)(B). However, the law does not expressly state that the National Taxpayer Advocate is authorized to access return information, attend meetings with other IRS employees, or obtain other information from the IRS.

**REASONS FOR CHANGE**

In general, the National Taxpayer Advocate has significant access to IRS systems and data. However, the IRS has sometimes declined to provide TAS with access to (1) audit files of taxpayers with cases open in TAS; (2) meetings between the IRS and taxpayers with cases open in TAS, even when the taxpayer has requested TAS's attendance; (3) advice that the Office of Chief Counsel has provided to other business units; and (4) information required by the National Taxpayer Advocate to enable her to analyze systemic problems for reports to Congress.

**RECOMMENDATIONS**

- Amend IRC § 7803(c) to clarify that the National Taxpayer Advocate (and authorized TAS employees) shall have access to tax returns, return information, and legal advice provided by the Office of Chief Counsel to any IRS employee regarding cases open and pending in TAS, and may participate in meetings between taxpayers and the IRS when asked to do so by a taxpayer.

- Clarify that, in furtherance of her tax administrative duties, the National Taxpayer Advocate (and authorized TAS employees) shall have access to all data, statistical information, legal advice provided by Counsel to any IRS employee, and documents necessary to perform a “full and substantive analysis” of the issues, as required by IRC § 7803(c)(2)(B).<sup>1</sup>

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<sup>1</sup> This recommendation is not intended to create a waiver of privilege with respect to information the IRS may lawfully keep confidential. When TAS receives information from the IRS, it protects the information from disclosure if the IRS asserts it is privileged. For more detail, see National Taxpayer Advocate 2016 Annual Report to Congress 34-36 (Special Focus: *Reinforce the National Taxpayer Advocate's Right of Access to Taxpayer and IRS Information and to Meetings Between the IRS and Taxpayers*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC16\\_Volume1\\_SpecialFocus.pdf#page=34](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC16_Volume1_SpecialFocus.pdf#page=34). Under the Taxpayer First Act of 2019, the Secretary is now required to provide the National Taxpayer Advocate with “statistical support” for the Annual Report to Congress. Pub. L. No. 116-25, § 1301(b), 133 Stat. 981 (2019). However, this requirement only encompasses statistical studies, compilations, and the review of information already obtained by TAS. It does not address TAS’s broader need for access to information, including the right to review case files and attend taxpayer meetings. The Taxpayer Rights Act of 2015, H.R. 4128, 114th Cong. § 403 (2015) and S. 2333, 114th Cong. § 403 (2015), would have granted TAS access to case-related files and meetings, but it did not address TAS’s need for access to information required to report on systemic issues.

**Legislative Recommendation #39****Authorize the National Taxpayer Advocate to File *Amicus* Briefs****SUMMARY**

- *Problem:* When a federal court is deciding a case that may affect the taxpayer rights of all or a large number of taxpayers, the court would benefit from hearing and considering the views of the National Taxpayer Advocate as the statutory voice of the taxpayer. Under current law, however, the National Taxpayer Advocate is not authorized to submit a brief in a federal tax case.
- *Solution:* Authorize the National Taxpayer Advocate to submit a brief in federal tax cases on issues pertaining to the protection of taxpayer rights.

**PRESENT LAW**

IRC § 7803(c)(2)(A) requires the Office of the Taxpayer Advocate to assist taxpayers in resolving problems with the IRS, to identify areas in which taxpayers experience problems in their dealings with the IRS, and to make administrative and legislative recommendations to mitigate such problems. IRC § 7803(c)(2)(B)(ii)(XI) directs the National Taxpayer Advocate in her annual reports to Congress to “identify the 10 most litigated issues for each category of taxpayers, including recommendations for mitigating such disputes.”

Under 28 U.S.C. § 516, only officers of the Department of Justice may represent the United States in litigation, except as otherwise authorized by law. Similarly, 5 U.S.C. § 3106 provides that the head of an executive department may not employ an attorney or counsel for the conduct of litigation in which the United States is a party, except as otherwise authorized by law. IRC § 7452 specifies that the Secretary of the Treasury “shall be represented by the Chief Counsel” or his delegate in litigation before the U.S. Tax Court.

Under 5 U.S.C. § 612(b), the Small Business Administration (SBA) Chief Counsel for Advocacy is statutorily authorized to represent the interests of small businesses by appearing in litigated cases as an *amicus curiae*. By contrast, the National Taxpayer Advocate, who is often referred to as “the voice of the taxpayer” both within the IRS and before Congress, is not authorized to represent the interests of taxpayers by appearing in litigated cases as an *amicus curiae*.

**REASONS FOR CHANGE**

While the conduct of trials is best left to trial lawyers equipped to advocate zealously on behalf of clients to win individual cases, precedential issues that could affect all or many taxpayers sometimes come before the courts with no one representing the interests of taxpayers as a group.

For example, in *Facebook, Inc. v. IRS*, the U.S. District Court for the Northern District of California considered Facebook’s claim that it was legally entitled to a hearing before the IRS Office of Appeals.<sup>1</sup> For support, *Facebook* cited the provision of the Taxpayer Bill of Rights (TBOR) that describes “the right to appeal a decision of the Internal Revenue Service in an independent forum.” See IRC § 7803(a)(3)(E). The court rejected Facebook’s position, broadly holding that TBOR “did not grant [taxpayers] new enforceable rights.” The court’s decision may well be correct, but in the rare cases where a court’s decision has the potential to affect the fundamental taxpayer rights of all or a large group of taxpayers, the court would benefit from hearing and considering the position of the National Taxpayer Advocate as the statutory voice of the taxpayer.

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<sup>1</sup> *Facebook, Inc. v. IRS*, 121 A.F.T.R.2d 1752 (N.D. Cal. 2018).

Just as the SBA Chief Counsel for Advocacy may file briefs to help ensure the federal courts are informed about the impact of regulations on small businesses, the National Taxpayer Advocate could be more effective in protecting taxpayer rights if she were granted comparable authority to file *amicus curiae* briefs in cases that affect taxpayer rights. It is anticipated this authority would be used sparingly, as is also the practice of the SBA Chief Counsel for Advocacy.

## RECOMMENDATION

- Amend IRC §§ 7803 and 7452 to authorize the National Taxpayer Advocate to submit briefs in federal litigation as an *amicus curiae* on matters relating to the protection of taxpayer rights.<sup>2</sup>

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<sup>2</sup> For more detail, see National Taxpayer Advocate 2016 Annual Report to Congress 37-39 (Special Focus: *Provide the National Taxpayer Advocate the Authority to Hire Independent Counsel, Comment on Regulations, and File Amicus Briefs in Litigation Raising Taxpayer Rights Issues*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC16\\_Volume1\\_SpecialFocus.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC16_Volume1_SpecialFocus.pdf); National Taxpayer Advocate 2011 Annual Report to Congress 573-581 (Legislative Recommendation: *Codify the Authority of the National Taxpayer Advocate to File Amicus Briefs, Comment on Regulations, and Issue Taxpayer Advocate Directives*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2011\\_ARC\\_Legislative-Recommendations.pdf#page=107](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2011_ARC_Legislative-Recommendations.pdf#page=107); National Taxpayer Advocate 2002 Annual Report to Congress 198-215 (Legislative Recommendation: *The Office of the Taxpayer Advocate*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/arc2002\\_section\\_two.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/arc2002_section_two.pdf). See also Program Manager Technical Advice 2007-00566 (Oct. 2, 2002), <https://www.irs.gov/privacy-disclosure/legal-advice-issued-to-program-managers-during-2007>.

**Legislative Recommendation #40****Require the IRS to Address the National Taxpayer Advocate's Comments in Final Rules****SUMMARY**

- *Problem:* The Treasury Department and the IRS issue a wide range of tax regulations that often affect taxpayer rights, yet there is no requirement that they seek input from the National Taxpayer Advocate on regulations or that they explain why they choose not to adopt the National Taxpayer Advocate's recommendations when provided.
- *Solution:* Require the Treasury Department to submit proposed or temporary regulations to the National Taxpayer Advocate for comment within a reasonable time and to address any comments formally submitted by the National Taxpayer Advocate in the preamble to final agency rules.

**PRESENT LAW**

IRC § 7805(f) requires the Secretary of the Treasury to submit certain proposed or temporary regulations to the Chief Counsel for Advocacy of the Small Business Administration (SBA) for comment regarding the impact such regulations may have on small businesses and to discuss any response to such comments in the preamble to the final regulations. Yet, despite the fact that the National Taxpayer Advocate is required by IRC § 7803(c)(2)(A) to assist taxpayers in resolving problems with the IRS and to identify administrative and legislative solutions, there is no comparable provision that requires the Secretary to seek comments from the National Taxpayer Advocate on proposed or temporary regulations or to discuss any response to such comments in the preamble to the final regulations.

**REASONS FOR CHANGE**

The requirement that the Secretary solicit and respond to comments from the SBA Chief Counsel for Advocacy benefits tax administration because it forces the agency to consider and respond to concerns about the impact of regulations on small businesses. Similarly, tax administration would benefit if the Secretary were required to consider and respond to the National Taxpayer Advocate's concerns about the impact of regulations on taxpayer rights and taxpayer burden.

The National Taxpayer Advocate currently provides comments to the IRS on an informal basis before proposed, temporary, and final regulations are made public and should continue to do so. But when the National Taxpayer Advocate believes a proposed or temporary regulation that has been publicly issued will have a significant adverse impact on taxpayers, the National Taxpayer Advocate should have the authority to submit formal comments to which the Treasury Department and the IRS must respond in the preamble to the final regulation. When the Treasury Department and the IRS decline to adopt the National Taxpayer Advocate's recommendations, the taxpaying public would benefit from knowing why. Such a procedure would strike an appropriate balance between allowing the National Taxpayer Advocate to provide informal comments within the agency and allowing her to raise concerns and compel an agency explanation where significant disagreements cannot be reconciled internally.



## RECOMMENDATION

- Amend IRC § 7805 to require the Secretary to submit proposed or temporary regulations to the National Taxpayer Advocate for comment within a reasonable time and to address any comments formally submitted by the National Taxpayer Advocate in the preamble to final agency rules.<sup>1</sup>

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<sup>1</sup> For legislative language generally consistent with this recommendation, see Taxpayer Bill of Rights Enhancement Act, S. 1578, 114th Cong. § 404 (2015) (except, as a timing matter, this bill would require the IRS to solicit comments from the National Taxpayer Advocate before publication of proposed or temporary regulations rather than after publication of such regulations, as the statute currently requires for SBA comments). For more detail, see National Taxpayer Advocate 2016 Annual Report to Congress 37-39 (Special Focus: *Provide the National Taxpayer Advocate the Authority to Hire Independent Counsel, Comment on Regulations, and File Amicus Briefs in Litigation Raising Taxpayer Rights Issues*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC16\\_Volume1\\_SpecialFocus.pdf#page=37](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC16_Volume1_SpecialFocus.pdf#page=37); National Taxpayer Advocate 2011 Annual Report to Congress 573-581 (Legislative Recommendation: *Codify the Authority of the National Taxpayer Advocate to File Amicus Briefs, Comment on Regulations, and Issue Taxpayer Advocate Directives*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2011\\_ARC\\_Legislative-Recommendations.pdf#page=107](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2011_ARC_Legislative-Recommendations.pdf#page=107); and National Taxpayer Advocate 2002 Annual Report to Congress 198-215 (Legislative Recommendation: *The Office of the Taxpayer Advocate*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/arc2002\\_section\\_two.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/arc2002_section_two.pdf). The comment procedure we are recommending is not intended to constitute a waiver of privilege with respect to internal IRS discussions or documents. To avoid ambiguity, we recommend that Congress include language in the statute or legislative history clarifying that no waiver of privilege will occur with respect to internal communications.

**Legislative Recommendation #41****Authorize the Office of the Taxpayer Advocate to Assist Certain Taxpayers During a Lapse in Appropriations****SUMMARY**

- *Problem:* During past government shutdowns, IRS lien and levy activities carried out by automation were permitted to continue, but IRS and TAS employees, including the National Taxpayer Advocate, were prohibited from assisting taxpayers who were experiencing hardships.
- *Solution:* Clarify that during a lapse in appropriations (i) the National Taxpayer Advocate may incur obligations in advance of appropriations for purposes of assisting taxpayers experiencing economic hardships and (ii) the IRS may incur obligations in advance of appropriations for purposes of complying with any Taxpayer Assistance Order (TAO).

**PRESENT LAW**

Article I of the Constitution provides that, “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”<sup>1</sup> The Antideficiency Act is one of several statutes that implement this provision.<sup>2</sup> Specifically, 31 U.S.C. § 1341(a), among other things, prohibits any officer or employee of the U.S. government or the District of Columbia government from (i) making or authorizing an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation or (ii) involving his or her respective government employer in a contract or obligation for the payment of money before an appropriation is made, unless authorized by law. The Antideficiency Act contains an additional prohibition against the acceptance of voluntary services in 31 U.S.C. § 1342, except “for emergencies involving the safety of human life or the protection of property.”

IRC § 6343(a)(1)(D) requires the Secretary to release a levy and promptly notify the affected person if the Secretary determines the levy “is creating an economic hardship due to the financial condition of the taxpayer.”

IRC § 7803(c)(2)(A) directs the Office of the Taxpayer Advocate (commonly referred to as the Taxpayer Advocate Service, or TAS) to “assist taxpayers in resolving problems with the Internal Revenue Service,” among other things. IRC § 7811 authorizes the National Taxpayer Advocate to issue a TAO where a “taxpayer is suffering or about to suffer a significant hardship as a result of the manner in which the internal revenue laws are being administered by the Secretary.” A significant hardship includes “an immediate threat of adverse action” and “irreparable injury to, or a long-term adverse impact on, the taxpayer if relief is not granted.” A TAO may require the Secretary “within a specified time period ... to release property of the taxpayer levied upon.”

**REASONS FOR CHANGE**

Lien and levy activities carried out by automation, which do not require the expenditure of additional appropriations, are permitted to continue during a lapse in appropriations. During both the 2018-2019 and 2013 shutdowns, the IRS issued thousands of notices of levy on Social Security and other government benefits as well as levies on wages and financial accounts of individuals and businesses because these notices were preprogrammed into the IRS’s computer systems before the shutdowns began.

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<sup>1</sup> U.S. CONST. art. I, § 9, cl. 7.

<sup>2</sup> Pub. L. No. 97-258, 96 Stat. 877, 923 (1982).

Despite IRC provisions that protect and relieve taxpayers who are experiencing hardship from levies, the IRS Lapse Plan has not allowed IRS or TAS employees, including the National Taxpayer Advocate, to work these cases during a shutdown.<sup>3</sup> Additionally, because cases that were in TAS's inventory at the time of the shutdown could not be worked, some taxpayers who requested the assistance of the National Taxpayer Advocate and TAS immediately prior to the shutdown experienced significant hardships and irreparable injuries.<sup>4</sup>

## RECOMMENDATION

- Clarify that during a lapse in appropriations (i) the National Taxpayer Advocate may incur obligations in advance of appropriations for purposes of assisting taxpayers experiencing an economic hardship within the meaning of IRC § 6343(a)(1)(D) due to an IRS action or inaction and (ii) the IRS may incur obligations in advance of appropriations for purposes of complying with any TAO issued pursuant to IRC § 7811.

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3 See IRS, Servicewide Electronic Research Program Alert 19A0017, Release of Levy and Release of Lien (2019) ("While there is a lapse in funding during the partial shutdown we are not authorized to take this action. We may do so once we are fully opened, so please call us back at that time. Please apologize to the taxpayer and explain we are not authorized to release the levy or lien due to the partial government shutdown. Explain that they may call us back after we are fully reopened.").

4 For additional discussion of how TAS's statutory authority to assist taxpayers suffering or about to suffer significant hardships was undermined during a shutdown, see National Taxpayer Advocate Fiscal Year 2015 Objectives Report to Congress 79-91 (Area of Focus: *The IRS's Decision Not to Except Any TAS Employees During the Government Shutdown Resulted in Violations of Taxpayer Rights and Undermined TAS's Statutory Authority to Assist Taxpayers Suffering or About to Suffer Significant Hardship*), <https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/The-IRSs-Decision-Not-to-Except-Any-TAS-Employees-During-the-Government-Shutdown.pdf> and National Taxpayer Advocate Fiscal Year 2020 Objectives Report to Congress 40-44 (*Impact of the 35-Day Partial Government Shutdown on the Taxpayer Advocate Service*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/JRC20\\_Volume1\\_GovShutdown.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/JRC20_Volume1_GovShutdown.pdf).

**Legislative Recommendation #42****Repeal Statute Suspension Under IRC § 7811(d) for Taxpayers Seeking Assistance From the Taxpayer Advocate Service****SUMMARY**

- *Problem:* When a taxpayer requests assistance from TAS in writing, IRC § 7811(d) provides that the period of limitations within which the IRS may assess or collect tax is extended. The provision is intended to protect the IRS's interests, but the IRS has not implemented it since its enactment in 1988. In addition, the provision does not apply when a taxpayer requests assistance from TAS by phone, so if implemented, taxpayers who request TAS assistance in writing and taxpayers who request TAS assistance by phone would be treated differently.
- *Solution:* Repeal IRC § 7811(d).

**PRESENT LAW**

IRC § 7811(d) suspends the statutory period of limitations for any action for which a taxpayer seeks assistance from TAS. The period is only suspended, however, if the taxpayer submits a written application for relief.<sup>1</sup>

**REASONS FOR CHANGE**

Despite the fact that Congress enacted this provision in 1988,<sup>2</sup> the IRS has never implemented it. The intent of the provision was to protect the interests of the government, but the IRS has not seen a need to make use of it. Relatedly, implementation of the rule would require significant technology upgrades and procedural changes that the IRS has chosen not to undertake.

In concept, IRC § 7811(d) aims to ensure that the IRS will not lose the ability to assess or collect tax if the applicable statutory deadlines pass while a taxpayer's case is pending with TAS. Suspension of the assessment or collection period would give the IRS more time to take enforcement actions.

However, statute suspensions are unnecessary to protect the government's interests. The IRS may take enforcement actions against taxpayers with open TAS cases, if necessary, to protect the government's interests.<sup>3</sup>

Moreover, if IRC § 7811(d) were ever to be implemented, it would cause similarly situated taxpayers to be treated differently. By its terms, the provision only applies when a taxpayer submits a written request for TAS assistance. It does not apply when a taxpayer requests TAS assistance by phone, which is the method by which most taxpayers seek TAS's help. Thus, this provision – apart from being unnecessary and unutilized – would produce disparate outcomes for taxpayers who, despite lacking any knowledge of this issue, contact TAS by different means.

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1 Treas. Reg. § 301.7811-1(e)(4).

2 Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6230, 102 Stat. 3342, 3734 (1988).

3 Even if TAS issues a Taxpayer Advocate Order (TAO) directing the IRS to suspend collection, TAS will generally agree to modify the TAO if collection is in jeopardy. And if TAS ever did not agree to do so, the Commissioner or Deputy Commissioner could modify or rescind the TAO. See IRC § 7811(c)(1).

Lastly, despite the IRS's decision not to implement the provision, it has been raised in litigation.<sup>4</sup> The National Taxpayer Advocate recommends this provision be repealed as it has not been used since it was enacted more than 30 years ago, it serves no useful purpose, and its repeal would prevent future litigation in which this provision is cited.

## RECOMMENDATION

- Repeal IRC § 7811(d).<sup>5</sup>

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4 In *Rothkamm v. United States*, 802 F.3d 699 (5th Cir. 2015), *rev'g* 2014 WL 4986884 (M.D. La. Sept. 15, 2014), the U.S. Court of Appeals for the Fifth Circuit held, in relevant part, that IRC § 7811(d) tolled the period for filing a wrongful levy claim, which by operation of IRC § 6532(c)(2) extended the period for filing suit. IRS Action on Decision 2020-03 (Apr. 24, 2020) explains that except for cases appealable to the Fifth Circuit, the IRS will not follow the holding in *Rothkamm* that IRC § 7811(d) suspends the running of the limitations periods for third parties to file wrongful levy claims or suits, and outside the Fifth Circuit, the government will continue to defend its interpretation.

5 For legislative language generally consistent with this recommendation, see John Lewis Taxpayer Protection Act, H.R. 3738, 117th Cong. § 202 (2021); Taxpayer Protection Act, H.R. 2171, 115th Cong. § 202 (2017); Taxpayer Protection Act, H.R. 4912, 114th Cong. § 202 (2016). For more detail, see National Taxpayer Advocate 2015 Annual Report to Congress 316-328 (Legislative Recommendation: *Repeal or Fix Statute Suspension Under IRC § 7811(d)*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC15\\_Volume1\\_LR\\_01\\_Statute-Limitations.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC15_Volume1_LR_01_Statute-Limitations.pdf).

## STRENGTHEN TAXPAYER RIGHTS IN JUDICIAL PROCEEDINGS

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### Legislative Recommendation #43

## Expand the Tax Court's Jurisdiction to Hear Refund Cases

### SUMMARY

- *Problem:* For most taxpayers, the U.S. Tax Court is the optimal court in which to challenge an adverse IRS decision, as payment is not a requirement for jurisdiction and the judges possess specialized tax expertise. Under current law, however, taxpayers generally may litigate in Tax Court only if the IRS determines they owe more tax and it issues a notice of deficiency. When taxpayers are solely seeking a refund because they believe they overpaid their tax, they are barred from the Tax Court and must litigate in other, less user-friendly, and more costly federal courts.
- *Solution:* Expand the Tax Court's jurisdiction to determine tax liabilities and refunds in refund cases.

### PRESENT LAW

IRC § 7442 defines the jurisdiction of the U.S. Tax Court. IRC § 6212 requires the IRS to issue a “notice of deficiency” before assessing certain liabilities. When the IRS issues a notice of deficiency, IRC § 6213 authorizes the taxpayer to petition the U.S. Tax Court within 90 days (or 150 days if the notice is addressed to a person outside the U.S.) to review the IRS determination.

If a taxpayer does not receive a notice of deficiency and seeks judicial review of an adverse IRS determination, the taxpayer must pay the tax, penalty, or interest and file suit in a U.S. district court or the U.S. Court of Federal Claims. This situation generally arises when the taxpayer is claiming a refund of tax, penalty or interest that has been paid. Taxpayers solely seeking refunds cannot litigate their cases in the Tax Court.

### REASONS FOR CHANGE

Due to the tax expertise of its judges, the Tax Court is often better equipped to consider tax controversies than other courts. It is also more accessible to less knowledgeable and unrepresented taxpayers than other courts because it uses informal procedures, particularly in disputes that do not exceed \$50,000. Another benefit is that low-income taxpayers representing themselves are generally offered the option of receiving free legal assistance from a Low Income Taxpayer Clinic or *pro bono* representative. In most instances, the Tax Court is the least expensive and best forum for low-income taxpayers to get their day in court.

Under current law, taxpayers who owe tax, receive a notice of deficiency, and wish to litigate a dispute with the IRS can file a petition in the Tax Court, while taxpayers who have paid their tax and are seeking a refund must sue for a refund in a U.S. district court or the U.S. Court of Federal Claims for a judicial determination. The National Taxpayer Advocate recommends that all taxpayers bringing refund suits be given the option to litigate their tax disputes in the Tax Court.

Two examples will illustrate the benefits of this approach:

*Example 1:* A taxpayer files a return that reflects a tax liability of \$15,000. The taxpayer had \$12,000 of withholding and pays an additional \$3,000 with the return. Shortly after filing his original return, his preparer discovers an error, and the taxpayer files an amended return showing a tax liability of \$11,000 and claiming a refund of \$4,000. The IRS denies the claim. Under current law, the taxpayer could not go to Tax Court because there is no deficiency (*i.e.*, no tax is due). To litigate his refund claim, the taxpayer would have

to file a refund suit in a U.S. district court or the U.S. Court of Federal Claims to pursue his \$4,000 refund claim. This taxpayer is harmed because refund suits involve greater cost and additional discovery burdens, and they are likely to require representation by an attorney.

*Example 2:* The IRS imposes an assessable penalty on a taxpayer of \$10,000. If the taxpayer unsuccessfully challenged the penalty administratively, the taxpayer will have to pay the penalty and file a refund suit in a U.S. district court or the U.S. Court of Federal Claims. Because no notice of deficiency has been issued in this case, no action could be brought in the Tax Court. Again, the taxpayer would have to pay the higher court fees and would probably have to retain an attorney to successfully dispute the assessment. If the taxpayer could bring her refund suit in the Tax Court, a judge with tax expertise would hear the case and the Tax Court's simplified procedures might allow the taxpayer to represent herself. This may make the difference between the taxpayer having her day in court or agreeing to an assessment simply because the costs of contesting it are too great.

By expanding the Tax Court's jurisdiction, Congress can give all taxpayers a better opportunity to obtain judicial review of adverse IRS liability determinations.

## RECOMMENDATION

- Amend IRC §§ 7442 and 7422 to give the Tax Court jurisdiction to determine liabilities in refund suits to the same extent as the U.S. district courts and the U.S. Court of Federal Claims.<sup>1</sup>

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<sup>1</sup> For a related recommendation that would allow taxpayers to challenge assessable penalties in the Tax Court, see Legislative Recommendation: *Provide That Assessable Penalties Are Subject to Deficiency Procedures*, *supra*. Based on existing law and procedures, the IRS Office of Chief Counsel represents the government in Tax Court cases, and the Justice Department's Tax Division represents the government in cases before a U.S. district court or the U.S. Court of Federal Claims. If the Tax Court's jurisdiction is expanded and some cases shift toward the Tax Court, the number of attorneys representing the government in each agency may require adjustment.



**Legislative Recommendation #44****Authorize the Tax Court to Order Refunds or Credits in Collection Due Process Proceedings Where Liability Is at Issue****SUMMARY**

- *Problem:* In most Tax Court cases, the court has the authority to determine that a taxpayer made an overpayment of tax and order the IRS to allow a refund or credit. Where a taxpayer cannot challenge the IRS's determination of liability before receiving a "collection due process" hearing, however, the Tax Court does not have the authority to order a refund or credit, thereby imposing financial costs and time burdens on taxpayers who must sue for a refund or credit in other federal courts. This also creates judicial inefficiencies by requiring the filing of multiple causes of action.
- *Solution:* Allow the Tax Court to order a refund or credit in all cases in which it is authorized to determine a taxpayer's tax liability.

**PRESENT LAW**

IRC § 6512(b) grants the Tax Court jurisdiction in deficiency suits to determine that a taxpayer made an overpayment of income tax for the period at issue and that such amount must be refunded or credited to the taxpayer.<sup>1</sup> IRC § 6511(a) generally requires a taxpayer to file a claim for credit or refund by the later of three years from the time a return was filed or, if no return was filed, two years from the time the tax was paid.

IRC § 6330 allows a taxpayer to challenge the underlying liability in a Collection Due Process (CDP) proceeding if the taxpayer "did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability."<sup>2</sup> However, several courts have concluded that the Tax Court in CDP cases, unlike in deficiency cases, does not have jurisdiction to determine the extent to which a taxpayer has made an overpayment and is entitled to a refund or credit.<sup>3</sup>

The reasoning for this conclusion is that section 6330(d)(1) "gives the Tax Court jurisdiction 'with respect to such matter' as is covered by the final determination in a requested hearing before the Appeals Office."<sup>4</sup> The Appeals determination is required to address (1) "the verification ... that the requirements of any applicable law or administrative procedure have been met,"<sup>5</sup> (2) any relevant issues raised by the taxpayer "related to the unpaid tax or the proposed levy" including "the existence or amount of the underlying tax liability" if the taxpayer "did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability,"<sup>6</sup> and (3) whether the proposed collection action "balances the need for efficient collection of taxes with the legitimate concerns of [the taxpayer] that any collection action be no more intrusive than necessary."<sup>7</sup> Based on these considerations, the Appeals Officer is supposed to make a determination "regarding the legitimacy of the proposed levy [or filing of notice of federal tax lien] and, if

1 IRC § 6401 provides that the term "overpayment" includes "that part of the amount of the payment of any internal revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto." The Supreme Court has stated that an overpayment occurs "when a taxpayer pays more than is owed, for whatever reason or no reason at all." *United States v. Dalm*, 494 U.S. 596, 609 n.6 (1990). See also *Jones v. Liberty Glass Co.*, 332 U.S. 524, 531 (1947).

2 IRC § 6330(c)(2)(B).

3 See *Greene-Thapedi v. Comm'r*, 126 T.C. 1 (2006); *Willson v. Comm'r*, 805 F.3d 316 (D.C. Cir. 2015); *McLane v. Comm'r*, T.C. Memo. 2018-149.

4 *Greene-Thapedi v. Comm'r*, 126 T.C. 1, at 6 (2006).

5 IRC § 6330(c)(1) & 6330(c)(3)(A).

6 IRC § 6330(c)(2) & 6330(c)(3)(B).

7 IRC § 6330(c)(3)(C).

relevant, the amount and/or existence of the unpaid tax liability.”<sup>8</sup> Because the existence or nonexistence of an overpayment is not pertinent to this determination by the Office of Appeals, the court lacks jurisdiction to review the issue.

## REASONS FOR CHANGE

The limitation on the Tax Court’s jurisdiction to determine an overpayment and order a refund in CDP cases prevents taxpayers from obtaining resolution of their tax disputes in a single forum and imposes unnecessary financial and administrative burdens on taxpayers and the court system.

The Tax Court, unlike other federal courts, is a pre-payment forum that ordinarily allows taxpayers to dispute their liabilities without having to first pay them in full. In a CDP proceeding, only taxpayers who did not otherwise have an opportunity to dispute their underlying liabilities are permitted to contest them.

Taxpayers who are allowed to challenge the existence of a liability in CDP can do so because they did not receive a notice of deficiency or did not otherwise have a previous opportunity to dispute the liability. When taxpayers do not “receive a notice of deficiency,” it generally means that either they were issued a notice of deficiency but did not actually receive it, or a type of tax was assessed against them that is not subject to deficiency procedures. A prior opportunity to dispute the liability means a prior opportunity for a conference with Appeals offered either before or after the assessment of the tax.<sup>9</sup> Therefore, if a taxpayer is allowed to challenge the liability in CDP, it means that the taxpayer has not had a prior opportunity to go to court or to Appeals.

Under these circumstances, the inability of the Tax Court to order a refund or credit seems not only unfair but inefficient. For a taxpayer in a CDP proceeding to receive a refund, the taxpayer must fully pay the assessed tax for the taxable year(s) at issue, file a timely administrative refund claim with the IRS under IRC § 6511 and, if the claim is denied, timely file a refund suit in a U.S. district court or the U.S. Court of Federal Claims. It would be much more efficient to allow the taxpayer to claim the refund in the CDP case and to allow the court that is already familiar with the facts of the case to determine whether an overpayment exists.

CDP taxpayers who may challenge the existence or amount of an underlying tax liability pursuant to IRC § 6330(c)(2)(B) should, similar to taxpayers in deficiency proceedings, have the opportunity to obtain a refund in a pre-payment forum, rather than be required to full-pay the asserted liability and then incur additional time and expense to dispute the liability in another forum. Amending IRC § 6330 to explicitly grant the Tax Court the authority to determine overpayments and order refunds in CDP cases will protect taxpayers’ right to finality, reduce taxpayer burden, and better ensure the IRS collects the correct amount of tax. The Tax Court could apply to CDP proceedings its long-established procedures for determining an overpayment in deficiency cases, so new procedures would not be required.

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<sup>8</sup> *Willson v. Comm’r*, 805 F.3d at 316.

<sup>9</sup> Treas. Reg. § 301.6330-1(e)(3), Q&A E2.

**RECOMMENDATION**

- Amend IRC § 6330(d)(1) to grant the Tax Court jurisdiction to determine overpayments for the tax periods at issue and to order refunds or credits in a CDP case, subject to the limitations of IRC §§ 6511(a) and 6512(b)(3), if the court determines that the taxpayer's underlying tax liability for a taxable year is less than the amounts paid or credited for that year.<sup>10</sup>

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<sup>10</sup> Under this proposal, refund claims in CDP cases would continue to be subject to the limitations of IRC §§ 6511(a) and 6512(b)(3). If the claim was filed by the taxpayer within three years from the time a return was filed, the refund would be limited to the amount paid in the three-year period (plus extensions) before the notice of deficiency was mailed and the amount paid after the notice of deficiency was mailed.

**Legislative Recommendation #45****Promote Consistency With the Supreme Court's *Boechler* Decision by Making the Time Limits for Bringing All Tax Litigation Subject to Equitable Judicial Doctrines****SUMMARY**

- *Problem:* The U.S. Supreme Court has held that the U.S. Tax Court may waive the 30-day deadline for filing a petition in a collection due process (CDP) case when it is equitable to do so (*e.g.*, if a taxpayer misses a filing deadline because he has had a heart attack and is temporarily incapacitated). Other provisions of the IRC also contain filing deadlines, but it is not clear whether courts have the authority to waive those deadlines on equitable grounds.
- *Solution:* Clarify that federal courts may waive filing deadlines when it is equitable to do so.

**PRESENT LAW**

Various provisions in the IRC authorize proceedings or suits against the government, provided such actions are brought timely. If a time limit for bringing suit is deemed a jurisdictional requirement, it cannot be waived or forfeited. It is not subject to equitable exceptions that might excuse an untimely filing. IRC § 7442, which relates to the jurisdiction of the U.S. Tax Court, does not specify that prescribed periods for petitioning the Tax Court are jurisdictional.<sup>1</sup>

Equitable doctrines that, if available, might excuse an untimely filing include equitable tolling (applicable when it is unfair to hold a plaintiff to a statutory deadline because of an extraordinary event that impeded the plaintiff's compliance); equitable estoppel (applicable when it is unfair to allow the defendant to benefit from the statutory deadline because of something the defendant did to prevent a timely suit); forfeiture (applicable when the parties have acted as if the case need not operate under the statutory deadlines); and waiver (applicable when the parties have agreed explicitly that a case need not operate under legal deadlines).

The U.S. Supreme Court held in the *Boechler* case that the 30-day time limit in IRC § 6330(d)(1) to file a petition with the U.S. Tax Court for review of a CDP determination is not a jurisdictional requirement.<sup>2</sup> The Court noted that time limits that are not jurisdictional are presumptively subject to equitable tolling and explained that “we treat a procedural requirement as jurisdictional only if Congress ‘clearly states’ that it is.”<sup>3</sup> After parsing the language of IRC § 6330(d)(1), the Court found no such clear statement.

Taxpayers generally bring their actions in the U.S. Tax Court, a U.S. district court, or the U.S. Court of Federal Claims.<sup>4</sup>

<sup>1</sup> IRC § 7442 provides in its entirety:

The Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title, by chapters 1, 2, 3, and 4 of the Internal Revenue Code of 1939, by title II and title III of the Revenue Act of 1926 (44 Stat. 10-87), or by laws enacted subsequent to February 26, 1926.

<sup>2</sup> *Boechler, P.C. v. Comm'r*, 142 S. Ct. 1493 (2022), *rev'g and remanding* 967 F.3d 760 (8th Cir. 2020).

<sup>3</sup> *Id.* at 1497.

<sup>4</sup> Some tax claims may also be heard by U.S. bankruptcy courts. The Supreme Court has held that the three-year lookback period that may qualify a tax liability for discharge in bankruptcy is subject to equitable tolling. *Young v. United States*, 535 U.S. 43, 47 (2002).

## U.S. Tax Court

CDP cases like the one in the *Boechler* case are not the only type of controversy in which taxpayers, by filing a petition in the U.S. Tax Court within a specified period, may litigate their tax liabilities without first paying the tax. Some other examples include deficiency proceedings and “standalone” innocent spouse cases (*i.e.*, where a taxpayer seeks innocent spouse relief in situations other than in response to a notice of deficiency or as part of a CDP proceeding).

IRC § 6213(a) provides that “[w]ithin 90 days . . . the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency.” The Supreme Court in *Boechler* acknowledged that lower courts have interpreted the IRC § 6213(a) deadline as jurisdictional and therefore not subject to equitable tolling but noted that “almost all [such lower court cases] predate this Court’s effort to ‘bring some discipline’ to the use of the term ‘jurisdictional.’”<sup>5</sup>

As for IRC provisions imposing time limits for requesting innocent spouse relief in standalone cases, the Supreme Court in *Boechler* noted that IRC § 6015(e)(1)(A) “much more clearly link[s] [its] jurisdictional grant[s] to a filing deadline,” but the Court did not decide whether the time limit is jurisdictional.<sup>6</sup> Prior to *Boechler*, three appellate courts agreed with the U.S. Tax Court and held that the time limit for requesting standalone innocent spouse relief is jurisdictional.<sup>7</sup>

## Other Federal Courts

Sometimes taxpayers may obtain judicial review in federal courts other than the Tax Court if they sue within a specified period. For example, a refund suit can generally be brought in the U.S. district courts or in the U.S. Court of Federal Claims within two years from the date the IRS denies a claim.<sup>8</sup> There is a split among the circuits regarding whether the statutory period for bringing a suit for refund is subject to equitable doctrines.<sup>9</sup>

Similarly, taxpayers may sue in a U.S. district court to enjoin enforcement of a wrongful levy or sale or to recover property (or proceeds from the sale of property) if they do so within a specified period (generally, within two years of levy).<sup>10</sup> Several federal courts have held that the period is not subject to equitable tolling,<sup>11</sup> but at least one appellate court has held that it is.<sup>12</sup>

5 *Boechler*, 142 S. Ct. 1493 (2022). After the Supreme Court issued its decision in the *Boechler* case, however, the Tax Court held that equitable tolling does not apply to deficiency cases. See *Hallmark v. Comm’r*, 159 T.C. No. 6 (2022). It is likely this decision will be appealed.

6 IRC § 6015(e)(1)(A), in relevant part, provides that “[t]he individual may petition the Tax Court (and the Tax Court shall have jurisdiction) to determine the appropriate relief available to the individual under this section if such petition is filed during the 90-day period.” The Court also noted that IRC § 6404(g)(1), which confers Tax Court “jurisdiction over any action . . . to determine whether the Secretary’s failure to abate interest under this section was an abuse of discretion, . . . if such action is brought within 180 days” more clearly links the jurisdictional grant to a filing deadline. *Id.* at 1498.

7 *Nauflett v. Comm’r*, 892 F.3d 649, 652-654 (4th Cir. 2018); *Matuszak v. Comm’r*, 862 F.3d 192, 196-198 (2d Cir. 2017); *Rubel v. Comm’r*, 856 F.3d 301, 306 (3d Cir. 2017).

8 IRC § 6532(a)(1).

9 Compare *RHI Holdings, Inc. v. United States*, 142 F.3d 1459, 1460-1463 (Fed. Cir. 1998) (declining to apply equitable principles to IRC § 6532), with *Wagner v. United States*, 353 F. Supp. 3d 1062 (E.D. Wash. 2018) (concluding the time limits set forth in IRC § 6532 are not jurisdictional and, moreover, that plaintiff’s petition was timely filed), and *Howard Bank v. United States*, 759 F. Supp. 1073, 1080 (D. Vt. 1991), *aff’d*, 948 F.2d 1275 (2d Cir. 1991) (applying equitable principles to IRC § 6532 and estopping the IRS from raising the limitations period as a bar to suit).

10 IRC § 6532(c).

11 See *Becton Dickinson and Co. v. Wolckenhauer*, 215 F.3d 340, 351-354 (3d Cir. 2000), and cases cited therein from four other circuits (holding that the IRC § 6532(c) period is jurisdictional and not subject to equitable tolling).

12 See, e.g., *Volpicelli v. United States*, 777 F.3d 1042, 1047 (9th Cir. 2015) (holding that the IRC § 6532(c) period is subject to equitable tolling); *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204 (9th Cir. 1995) (same).

Taxpayers may also bring suit, if they do so within the specified periods, to seek civil damages in a U.S. district court or bankruptcy court regarding unauthorized actions by the IRS.<sup>13</sup> Courts have differed on whether equitable doctrines can toll the period for bringing suit.<sup>14</sup>

## REASONS FOR CHANGE

The *Boechler* decision clarified that the filing deadline in CDP cases is not jurisdictional, but it did not address whether filing deadlines in other tax cases are jurisdictional. There is inconsistency in lower courts' interpretations of the various statutes that contain filing deadlines in tax cases.

The consequence for failing to commence suit in the Tax Court or another federal court within the time limits prescribed by the IRC is severe: taxpayers lose their day in that court, which may be the only prepayment forum, or the only forum at all, with jurisdiction to hear their claim.

Treating the IRC time limits for bringing suit as jurisdictional – which means that taxpayers who file suit even seconds late are barred from court regardless of the cause – can lead to harsh and unfair results. For example, the IRS itself occasionally provides inaccurate information to taxpayers regarding the filing deadline, and even in that circumstance, the court has declined to hear the taxpayer's case.<sup>15</sup> Other extenuating circumstances may include a medical emergency (*e.g.*, a heart attack or other medical condition that requires a taxpayer to be hospitalized or causes him or her to be in a coma).<sup>16</sup> Moreover, most U.S. Tax Court petitioners do not have representation, and unrepresented taxpayers are less likely to recognize the severe consequences of filing a late petition.

The *right to a fair and just tax system*<sup>17</sup> requires that equitable doctrines be available to excuse a late filing in extenuating circumstances. Taxpayers would still be required to demonstrate that an equitable doctrine applies, and courts could apply the doctrines narrowly. But the National Taxpayer Advocate believes courts should have the flexibility to make those judgments.

13 IRC §§ 7431(d); 7432(d)(3); 7433(d)(3).

14 Compare *Aloe Vera of America, Inc. v. United States*, 580 F.3d 867, 871-872 (9th Cir. 2009) (holding that the time for bringing suit under IRC § 7431 is not subject to equitable tolling) and *Hynard v. IRS*, 233 F. Supp. 2d 502, 509 (S.D. N.Y. 2002) (holding that the time for bringing suit under IRC § 7433 is not subject to equitable tolling), with *Ramos v. United States*, 90 A.F.T.R.2d (RIA) 7176 (N.D. Cal. 2002) (denying motion to dismiss because doctrine of equitable tolling might apply to an IRC § 7433 action), and *Bennett v. United States*, 366 F. Supp. 2d 877, 879 (D. Neb. 2005) (holding that the application of equitable tolling to IRC §§ 7432 and 7433 actions has not been definitively determined, but it is an extraordinary remedy and did not apply in this case).

15 See, *e.g.*, *Naufflett*, 892 F.3d at 652-654 (doctrine of equitable tolling did not apply to innocent spouse case despite reliance on alleged erroneous IRS advice regarding the filing deadline); see also *Rubel v. Comm'r*, 856 F.3d 301, 306 (3d Cir. 2017).

16 In the context of administrative refund claims, the IRC essentially incorporates the doctrine of equitable tolling. Under IRC § 6511(h), a taxpayer in a coma would likely be able to show that he or she was “financially disabled.” In that case, the IRC § 6511 statute of limitation would be suspended for the period during which the taxpayer was financially disabled, giving the taxpayer more time to request a refund even if the deadline for doing so otherwise would have expired. We see no reason why court filing deadlines should provide less flexibility.

17 See IRC § 7803(a)(3)(J), <https://www.irs.gov/taxpayer-bill-of-rights> (identifying the “right to a fair and just tax system” as a taxpayer right). The Taxpayer Bill of Rights (TBOR) lists rights that already existed in the tax code, putting them in simple language and grouping them into ten fundamental rights. Employees are responsible for being familiar with and acting in accord with TBOR, including the “right to a fair and just tax system.”

## RECOMMENDATION

- Enact a new section of the IRC to clarify that the periods in the IRC within which taxpayers may petition the Tax Court or file suit in other federal courts are not jurisdictional and are subject to equitable judicial doctrines.<sup>18</sup>

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<sup>18</sup> If this change to the IRC is enacted, a late-filed petition in Tax Court would no longer be dismissed for lack of jurisdiction if the taxpayer is able to establish that equitable tolling should apply. That would mean that a dismissal of a petition from a notice of deficiency by the Tax Court due to untimeliness would be treated as a decision on the merits under IRC § 7459(d), and the doctrine of *res judicata* would prevent the taxpayer from pursuing a refund suit. We therefore recommend that IRC § 7459(d) be correspondingly amended to make clear that a dismissal based on untimeliness is not a decision on the merits.



**Legislative Recommendation #46****Extend the Deadline for Taxpayers to Bring a Refund Suit When They Have Requested Appeals Reconsideration of a Notice of Claim Disallowance But the IRS Has Not Acted Timely to Decide Their Claims****SUMMARY**

- *Problem:* When a taxpayer files a claim for credit or refund and the IRS denies it by sending a notice of claim disallowance, the taxpayer may request reconsideration of that disallowance by the IRS's Independent Office of Appeals (Appeals). If Appeals sustains the denial or does not take action, the taxpayer may bring a refund suit in a U.S. district court or the U.S. Court of Federal Claims but must do so within two years of the date on which the notice of claim disallowance was mailed, unless the taxpayer and the IRS both execute an agreement to extend the time to bring a refund suit. *There is no designated method for taxpayers to get the IRS to execute such an agreement, and consideration of the claim by Appeals does not extend this limitation period.*

If the taxpayer doesn't bring a timely refund suit while waiting for the outcome of Appeals' reconsideration of the claim, any refund issued after the period for bringing suit is an erroneous refund, and any credit is considered void. If there are delays in getting a claim to Appeals or in Appeals' reconsideration of the claim, the unsophisticated taxpayer who chooses to wait for the outcome of Appeals' reconsideration may lose out on the refund because the deadline for the taxpayer to bring suit and the deadline for the IRS to pay the refund (or apply the credit) has passed.

- *Solution:* Extend the two-year period within which the taxpayer must bring suit if the taxpayer has timely requested Appeals' reconsideration of a notice of claim disallowance and Appeals has not rendered a decision within two years of the denial of the refund claim.

**PRESENT LAW**

If the IRS denies a taxpayer's claim for refund by issuing a notice of claim disallowance,<sup>1</sup> the taxpayer may bring a suit for refund in a U.S. district court or the U.S. Court of Federal Claims. IRC § 6532(a)(1) requires that a refund suit must be initiated within two years from the date on which the IRS mailed the notice of claim disallowance. IRC § 6514(a)(2) prohibits the IRS from issuing a refund after the two-year period for filing a refund suit expires, unless the taxpayer has brought a timely suit.

IRC § 6532(a)(2) provides that the period for bringing a refund suit may be extended by written agreement between the taxpayer and the IRS. Any extension must be executed by the taxpayer and the IRS before the 2-year period has expired.<sup>2</sup> While a taxpayer may request Appeals' reconsideration of a claim after the IRS has issued a notice of claim disallowance, IRC § 6532(a)(4) specifically provides that such reconsideration does not extend the period to bring a refund suit.

<sup>1</sup> The letters that the IRS most commonly uses to notify a taxpayer that a claim has been disallowed are Letter 105C, Claim Disallowed, and Letter 106C, Claim Partially Disallowed.

<sup>2</sup> Rev. Rul. 71-57, 1971-1 C.B. 405.

## REASONS FOR CHANGE

The strict two-year limitation on bringing a refund suit and the requirement that any refund must be paid within that period poses hazards for tax professionals and unsophisticated taxpayers alike. They may assume that because they are actively pursuing resolution of their claim by Appeals, their rights to file suit and to receive a refund are protected. Many taxpayers are unaware that, under current law, reconsideration of a disallowed claim does not extend the period to file suit under IRC § 6532 or the period within which the IRS is permitted to issue a refund under IRC § 6514. They do not know that if Appeals doesn't complete consideration of their claim within the two-year period after the mailing of the notice of claim disallowance, the IRS is prohibited by IRC § 6514(a)(2) from issuing a refund. This is true even if the IRS agrees that a refund is owed. IRC § 6514(a)(2) even prohibits the IRS from issuing a refund in cases where Appeals has made a determination within the period to file suit but the IRS did not issue the payment or allow the credit during that period.

The IRS created Form 907, Agreement to Extend the Time to Bring Suit, for use in extending the period to bring a refund suit. However, the Form 907 must be countersigned by the IRS, and there is no designated method for taxpayers to submit the form to the IRS to be countersigned.<sup>3</sup>

Current law may inadvertently discourage taxpayers from seeking administrative resolution of disputed issues because of the risk that their refund claims could become time-barred while an appeal is pending. Conversely, it may encourage unnecessary litigation to protect the refund statute of limitations. It is in the interest of all parties to allow the administrative process to play out without jeopardizing the taxpayer's ability to seek judicial review. By allowing the administrative appeal process to reach a conclusion, the taxpayer may avoid the challenges and costs of bringing a lawsuit; the U.S. Department of Justice (which represents the government in refund litigation) may avoid the challenges and costs of defending against a lawsuit; and the federal courts may avoid hearing a case that the taxpayer and the IRS can resolve without judicial involvement.

The National Taxpayer Advocate appreciates the value of statutes of limitations to prevent open-ended claims. But where a taxpayer is working with the IRS to reach an administrative resolution, the period of limitations should not jeopardize the taxpayer's ability to receive a refund or credit or to obtain judicial review of an adverse Appeals determination when the IRS does not act timely. This is particularly true where a taxpayer is timely in requesting review and responding to all document requests, but where Appeals is simply behind on its case inventories or where a case gets lost in transit between different IRS functions. To prevent these inequities, IRC § 6532 should be amended to remove paragraph (a)(4), which provides that any administrative reconsideration of a disallowed claim does not extend the period to file a refund suit. It should be further amended to ensure that where a taxpayer makes a timely request for Appeals' review of a disallowed claim, the period to file a refund suit will not expire for at least six months after the date when Appeals makes a final determination with respect to the taxpayer's claim. If Appeals ultimately denies the taxpayer's claim, this change will give the taxpayer a full six months to decide whether to pursue judicial review and to prepare and file a complaint. If Appeals ultimately allows the taxpayer's claim, this change will give the IRS a full six months to issue the refund or allow the credit.<sup>4</sup>

3 See Erin M. Collins, Notice of Claim Disallowance: Don't Make This Mistake, NATIONAL TAXPAYER ADVOCATE BLOG (Apr. 6, 2022), <https://www.taxpayeradvocate.irs.gov/news/nta-blog-notice-of-claim-disallowance-dont-make-this-mistake>.

4 IRC § 6514(a)(2) prohibits the issuance of a refund after the expiration of the period for filing a refund suit. By amending IRC § 6532(a) to extend the period to file suit, the period within which the IRS may pay a refund or issue a credit under IRC § 6514(a)(2) would similarly be extended.

## RECOMMENDATION

- Amend IRC § 6532(a) to remove subsection (a)(4) and to provide that, where a taxpayer has submitted a written request for reconsideration of a disallowed claim by the IRS's Independent Office of Appeals within two years of the mailing of a notice of claim disallowance, the time to bring a suit for refund shall not expire before the later of (1) the standard two-year period provided in IRC § 6532(a)(1) or (2) six months after the date of the Appeals closing letter.<sup>5</sup>

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<sup>5</sup> On occasion, taxpayers have sought to refresh time-barred claims by filing later claims that are identical or substantially identical. We do not recommend Congress permit such end-runs around the rule, and the courts generally have not allowed them. *See Peretz v. United States*, 148 Fed. Cl. 586, 607 (2020) ("This court and its predecessor courts, as well as courts in other circuits, have long held that repetitively filed claims do not extend the time for which a plaintiff can file suit under 26 U.S.C. § 6532.") (and cases cited therein). If Congress is concerned about potential abuse, our recommendation could be modified to provide that an extension beyond two years will only be permitted for the first refund claim filed for a tax period.

**Legislative Recommendation #47****Authorize the Tax Court to Sign Subpoenas for the Production of Records Held by a Third Party Prior to a Scheduled Hearing****SUMMARY**

- *Problem:* The Tax Court's pre-trial discovery powers are more limited than those of other federal courts. As a result, litigants often must attend pre-trial conferences solely to request or obtain books, records and other key documents, and pre-trial discussions may be delayed or impeded, increasing the likelihood cases that otherwise would be settled must go to trial.
- *Solution:* Authorize the Tax Court to issue third-party subpoenas prior to a scheduled hearing.

**PRESENT LAW**

IRC § 7456(a) authorizes the Tax Court to issue subpoenas for the “production of all necessary returns, books, papers, documents, correspondence, and other evidence, from any place in the United States at any designated place of hearing...” The Tax Court interprets IRC § 7456(a) as permitting it to issue subpoenas to produce documents by a third party only at trial sessions, at depositions, and at pre-trial conferences.<sup>1</sup> The Tax Court does not believe it has the authority to issue a subpoena directing a third party to produce records in advance of a trial session to facilitate pre-trial discovery.

**REASONS FOR CHANGE**

Efficient pre-trial discovery is an important means of limiting litigation and promoting settlement between the parties. Rule 45 of the Federal Rules of Civil Procedure (FRCP) allows for the use of subpoenas to secure pre-trial discovery of documents, including third-party documents to be produced prior to the scheduling of any hearing or deposition. The Tax Court, however, is governed by Tax Court Rules rather than the FRCP. Unlike FRCP Rule 45, the analogous Tax Court rule (Tax Court Rule 147) does not provide for the use of subpoenas to enforce delivery of documents prior to a hearing, such as a deposition or a trial.

The Tax Court's authority was addressed in *Johnson v. Commissioner*.<sup>2</sup> In that case, the IRS issued a third-party subpoena to Bank of America for the production of documents. The taxpayer assented to the subpoena. Likewise, Bank of America expressed a willingness to comply, but not before the date specified in a properly authorized subpoena.

The IRS filed a motion asking the Tax Court to permit it to issue a subpoena directing Bank of America to produce the requested documents “prior to” the date of the scheduled trial session. The motion stated that obtaining the documents in advance of the scheduled trial might obviate the need for Bank of America to appear at the trial and facilitate settlement discussions with the taxpayer that might eliminate the need for a trial. The Tax Court stated that the IRS's position was “not unreasonable” and that production of the documents might benefit all parties. Nevertheless, it concluded that it lacked the authority to issue such a subpoena. Under IRC § 7456(a), the Tax Court concluded it could only authorize a third-party subpoena for the production of documents on the hearing date.

<sup>1</sup> *Johnson v. Comm'r*, Docket No. 17324-18 (T.C. Dec. 26, 2019).

<sup>2</sup> *Id.* During the COVID-19 pandemic, the Tax Court held remote (virtual) sessions, and as part of the rules governing remote proceedings, it allowed parties to subpoena third-party witnesses to produce documents via a remote document subpoena hearing at a date in advance of the remote trial. U.S. Tax Court, *Subpoenas for Remote Proceedings* (Aug. 27, 2020), [https://www.ustaxcourt.gov/resources/zoomgov/subpoenas\\_for\\_remote\\_proceedings.pdf](https://www.ustaxcourt.gov/resources/zoomgov/subpoenas_for_remote_proceedings.pdf). As the pandemic has waned, the court is discontinuing remote sessions. It does not appear the court is applying these procedures to in-person sessions.

Recognizing the potential benefits arising from earlier document delivery, the Tax Court's order discussed several workarounds the litigants could employ to secure the documents before trial. The National Taxpayer Advocate believes this should not be necessary. There is no good reason the authority of the Tax Court should be more limited than the authority of other federal courts to issue subpoenas that would allow the parties to engage in pre-trial discovery to resolve or narrow issues without the need for judicial involvement.

## RECOMMENDATION

- Amend IRC § 7456(a) to expand the authority of the Tax Court to issue subpoenas directing the production of records held by a third party prior to a scheduled hearing.<sup>3</sup>

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<sup>3</sup> A similar recommendation was proposed on the Procedurally Taxing blog in January 2020. See William Schmidt, *Serving Subpoenas: Designated Orders 12/23/19 to 12/27/19*, PROCEDURALLY TAXING, <https://procedurallytaxing.com/serving-subpoenas-designated-orders-12-23-19-to-12-27-19/> (Jan. 29, 2020).

**Legislative Recommendation #48****Provide That the Scope of Judicial Review of “Innocent Spouse” Determinations Under IRC § 6015 Is *De Novo*****SUMMARY**

- *Problem:* If the IRS denies a taxpayer’s request for equitable innocent spouse relief, the taxpayer may request judicial review of the IRS’s denial, but in doing so, the taxpayer is generally prohibited from presenting evidence to a judge that the taxpayer did not previously present to the IRS unless the evidence is “newly discovered.” This is true even if the requesting spouse was subjected to domestic violence or psychological abuse that caused him or her not to present the evidence to the IRS. This limitation on introducing evidence can prevent taxpayers who otherwise qualify for innocent spouse relief from receiving it. It can fall particularly hard on unrepresented taxpayers who did not understand this requirement when they were dealing with the IRS.
- *Solution:* Revise IRC § 6015 to allow courts to consider all relevant evidence in reviewing equitable innocent spouse cases.

**PRESENT LAW**

Taxpayers who file joint federal income tax returns are jointly and severally liable for any deficiency or tax due in connection with their joint returns. IRC § 6015, sometimes referred to as the “innocent spouse” rules, provides relief from joint and several liability under certain circumstances. If “traditional” relief from a deficiency is unavailable under subsection (b) and “separation of liability” from a deficiency is unavailable under subsection (c), a taxpayer may qualify for “equitable” relief from deficiencies and underpayments under subsection (f). Relief under IRC § 6015(f) is appropriate when, considering all the facts and circumstances of a case, it would be inequitable to hold a joint filer liable for the unpaid tax or deficiency. If the IRS denies relief under any subsection of IRC § 6015 or a request for relief has gone unanswered for six months, the taxpayer may file a petition with the U.S. Tax Court.

In recent years, there has been uncertainty regarding both the scope of review and the standard of review that the Tax Court should apply in innocent spouse cases. In 2008, the Tax Court held that the scope of its review in IRC § 6015(f) cases, like its review in IRC § 6015(b) and (c) cases, is *de novo*, meaning it may consider evidence introduced at trial that was not included in the administrative record.<sup>1</sup> In 2009, the Tax Court held that the standard of review in IRC § 6015(f) cases is also *de novo*, meaning that the Tax Court will consider the case anew, without deference to the IRS’s determination.<sup>2</sup>

In 2009, the IRS Office of Chief Counsel (Chief Counsel) issued guidance to its attorneys instructing them to argue, contrary to the Tax Court’s holdings, that review in all IRC § 6015(f) cases is limited to issues and evidence presented before the IRS Appeals or Examination functions and that the proper standard of review is “abuse of discretion.”<sup>3</sup> In 2011, the National Taxpayer Advocate recommended that Congress amend IRC § 6015 to reflect the Tax Court’s holdings and reject the IRS’s position.

In June 2013, following an appellate court decision affirming the Tax Court’s holdings, Chief Counsel issued guidance instructing its attorneys to cease arguing that the scope and standard of review in IRC § 6015(f)

1 *Porter v. Comm’r*, 130 T.C. 115 (2008).

2 *Porter v. Comm’r*, 132 T.C. 203 (2009) (a continuation of the same case that produced the 2008 holding, discussed above, that Tax Court’s review of denials of relief under IRC § 6015(f) is not limited to the administrative record).

3 IRS Chief Counsel Notice CC-2009-021, Litigating Cases Involving Claims for Relief From Joint and Several Liability Under Section 6015(f): Scope and Standard of Review (June 30, 2009).

cases are not *de novo*.<sup>4</sup> In June 2013, Chief Counsel also issued an Action on Decision stating that although the IRS disagrees that IRC § 6015(e)(1) provides for both a *de novo* standard of review and a *de novo* scope of review, the IRS would no longer argue that the Tax Court should limit its review to the administrative record or review IRC § 6015(f) claims solely for an abuse of discretion.<sup>5</sup>

In 2019, Congress added paragraph (7) to IRC § 6015(e). It provides that “any review of a determination made under this section is *de novo* by the Tax Court.”<sup>6</sup> However, this *de novo* review is limited to consideration of “(A) the administrative record established at the time of the determination, and (B) any additional newly discovered or previously unavailable evidence.” The provision does not define the terms “newly discovered” or “previously unavailable.”

## REASONS FOR CHANGE

IRC § 6015(e)(7), which limits the Tax Court’s scope of review, applies to determinations made “under this section” (*i.e.*, IRC § 6015). Thus, the provision supersedes Tax Court jurisprudence regarding the review not only in IRC § 6015(f) cases, but also in cases involving the application of IRC § 6015(b) and (c).

The provision may be intended to encourage the IRS and taxpayers to compile a complete administrative record or resolve cases without litigation. In some cases, however, taxpayers – and particularly taxpayers not represented by counsel – may not appreciate the significance of certain evidence or the consequences of failing to present it to the IRS. In other cases, taxpayers may present relevant evidence during trial to a neutral third party – the judge – that they are reluctant to share with the IRS, such as evidence of the other joint filer’s domestic violence or abuse.<sup>7</sup>

It is difficult to imagine a state law that bars victims of domestic violence from introducing evidence at trial that goes beyond what they initially told police and was included in police records. The requirement that the Tax Court generally limit itself to considering evidence included in the administrative record – even where the requesting spouse suffered from domestic violence and otherwise meets the innocent spouse requirements – is similarly wrong.

Under the current rule, some taxpayers could be deprived of meaningful Tax Court review, particularly taxpayers who filed Tax Court petitions when their requests for relief went unanswered for six months. In these cases, the administrative record may consist of little more than the taxpayer’s skeletal responses to the information solicited by Form 8857, Request for Innocent Spouse Relief, and the IRS may argue that the taxpayer’s evidence is not “newly discovered” or “previously unavailable.”<sup>8</sup> If the IRS argues under IRC § 6015(e)(7) that the taxpayer’s evidence should not be considered because it was available but not presented when the IRS made its determination and the Tax Court accepts this argument, the court may

4 IRS Chief Counsel Notice CC-2013-011, Litigating Cases That Involve Claims for Relief From Joint and Several Liability Under Section 6015 (June 7, 2013).

5 Action on Decision (AOD) 2012-07, I.R.B. 2013-25 (June 17, 2013), issued in response to *Wilson v. Comm’r*, 705 F.3d 980 (9th Cir. 2013), *aff’g* T.C. Memo. 2010-134. An AOD is a formal memorandum prepared by Chief Counsel that announces the litigation position the IRS will take in the future regarding the issue addressed in the AOD.

6 Taxpayer First Act, Pub. L. No. 116-25, § 1203, 133 Stat. 981 (2019). In other cases, such as where a taxpayer raises innocent spouse as a defense in a deficiency case, the Tax Court’s scope and standard of review will continue to be *de novo*. See *Eze v. Comm’r*, No. 17486-19S (T.C. Jan. 21, 2022), a non-precedential case in which the court relied on *Porter v. Comm’r*, 132 T.C. 203 (2009).

7 Abuse that prevented a taxpayer from challenging the treatment of an item on a joint return out of fear the other spouse might retaliate would weigh in favor of granting relief. *Stephenson v. Comm’r*, T.C. Memo. 2011-16, is an example of a case in which the Tax Court’s finding that the petitioner was physically and verbally abused by her husband was largely based on evidence produced at trial because the issue of abuse was not fully developed administratively.

8 Chief Counsel has not issued formal guidance to its attorneys about what arguments to make in cases in which IRC § 6015(e)(7) may apply.



decide the case *de novo* based solely on the scant evidence contained in the administrative record.<sup>9</sup> To enable the Tax Court to make the correct decision based on the merits, the National Taxpayer Advocate believes the court should be permitted to consider all evidence, whether or not it could have been provided to the IRS in a prior administrative proceeding.

Finally, some taxpayers who wish to obtain review by a federal court that is *de novo* in scope may pay the asserted tax and bring a refund suit before a U.S. district court or the U.S. Court of Federal Claims. But this approach carries the risk that these courts may conclude they lack jurisdiction to hear innocent spouse claims.<sup>10</sup> To address these cases, and in recognition that innocent spouse claims often follow domestic violence or emotional abuse, the National Taxpayer Advocate recommends the statute be amended to allow all courts with jurisdiction to consider all relevant evidence in IRC § 6015 cases.

## RECOMMENDATION

- Remove IRC § 6015(e)(7)(A) and (B) and revise IRC § 6015(e)(7) to provide: “The standard and scope of any review of a determination made under this section by the Tax Court or other court of competent jurisdiction shall be *de novo*.”<sup>11</sup>

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9 Where the IRS does not answer a taxpayer’s request for relief for more than six months, the court may remand the case and direct the IRS to do so, which may prolong resolution of the case.

10 The National Taxpayer Advocate recommends that Congress address this risk. See *Clarify That Taxpayers May Raise Innocent Spouse Relief as a Defense in Collection, Bankruptcy and Refund Cases*, *infra*.

11 This recommendation averts the possibility that the language in IRC § 6015(e)(7) that “[a]ny review of a determination under this section shall be reviewed *de novo* by the Tax Court” could be construed as conferring exclusive jurisdiction on the Tax Court to hear innocent spouse claims, which would preclude innocent spouse relief in collection, bankruptcy, and refund cases litigated in other federal courts and would be inconsistent with IRC § 6015(e)(1)(A) (conferring Tax Court jurisdiction “in addition to any other remedy provided by law”). Such an interpretation would also be inconsistent with the legislative recommendation *Clarify That Taxpayers May Raise Innocent Spouse Relief as a Defense in Collection, Bankruptcy and Refund Cases*, *infra*.

## Legislative Recommendation #49

## Clarify That Taxpayers May Raise Innocent Spouse Relief as a Defense in Collection, Bankruptcy, and Refund Cases

### SUMMARY

- *Problem:* Some federal courts have allowed taxpayers to make requests for innocent spouse relief in collection, bankruptcy, and refund cases, while others have not. As a result, similarly situated taxpayers are treated inconsistently, and some taxpayers are left without any forum in which to seek innocent spouse relief before a court enters a financially damaging judgment.
- *Solution:* Clarify that U.S. district courts, bankruptcy courts, and the U.S. Court of Federal Claims have jurisdiction to grant innocent spouse relief in collection, bankruptcy, and refund cases.

### PRESENT LAW

Married taxpayers who file joint returns are jointly and severally liable for any deficiency or tax due. Spouses who live in community property states and file separate returns are generally required to report half the community income on their separate returns. As an exception, IRC §§ 6015 and 66, sometimes referred to as the “innocent spouse” rules, provide relief from joint and several liability and from the operation of community property rules. Taxpayers seeking innocent spouse relief generally must file Form 8857, Request for Innocent Spouse Relief. After reviewing the request, the IRS issues a final notice of determination granting or denying relief in whole or in part.

If a taxpayer files a petition within 90 days from the date the IRS issues its final notice of determination, the U.S. Tax Court has jurisdiction to determine the appropriate relief. The Tax Court’s jurisdiction to decide innocent spouse claims does not appear to be exclusive; IRC § 6015(e)(1)(A) provides that an individual may petition the Tax Court for review of an innocent spouse determination “in addition to any other remedy provided by law.”

The Tax Court is the only prepayment judicial forum in which a taxpayer may obtain review of an adverse IRS determination. However, there is no right to a jury trial in Tax Court. Moreover, while the standard of review of a denial of a claim for innocent spouse relief under IRC § 6015 is *de novo*, the scope of the Tax Court’s review is limited to “(A) the administrative record established at the time of the determination, and (B) any additional newly discovered or previously unavailable evidence.”<sup>1</sup>

The Tax Court does not have jurisdiction over collection suits arising under IRC §§ 7402 or 7403, over bankruptcy proceedings arising under Title 11 of the United States Code, or over refund suits arising under IRC § 7422. Some federal courts with jurisdiction in these cases have considered taxpayers’ innocent spouse claims, which is consistent with IRC § 6015(e)(1)(A).<sup>2</sup>

<sup>1</sup> IRC § 6015(e)(7). This provision was enacted as part of the Taxpayer First Act, Pub. L. No. 116-25, § 1203, 133 Stat. 981, 988 (2019). The National Taxpayer Advocate recommends revising IRC § 6015(e)(7) to remove this limitation on the Tax Court’s scope of review. See *Provide That the Scope of Judicial Review of Determinations Under IRC § 6015 Is De Novo*, *supra*.

<sup>2</sup> See, e.g., *United States v. Diehl*, 460 F. Supp. 1282 (S.D. Tex. 1976), *aff’d per curiam*, 586 F.2d 1080 (5th Cir. 1978) (IRC § 7402 suit to reduce an assessment to judgment); *In re Pendergraft*, 119 A.F.T.R.2d (RIA) 1229 (Bankr. S.D. Tex. 2017) (bankruptcy proceeding); *In re Bowman*, 129 A.F.T.R.2d (RIA) 909 (Bankr. E.D. La. 2022) (bankruptcy proceeding); and *Hockin v. United States*, 400 F. Supp. 3d 1085, 1092 n.2 (D. Or. 2019) (refund suit).

However, other federal courts have held that the Tax Court’s jurisdiction to decide innocent spouse claims is exclusive and have declined to consider such claims in collection, bankruptcy, and refund cases.<sup>3</sup>

## REASONS FOR CHANGE

Inconsistent decisions about whether taxpayers may seek innocent spouse relief in collection, bankruptcy, and refund cases have created confusion and resulted in different treatment of similarly situated taxpayers. In addition, treating the Tax Court as having exclusive jurisdiction over innocent spouse claims may create economic hardships. If the federal courts that decide collection, bankruptcy, and refund cases cannot consider innocent spouse claims, taxpayers in those cases may be left without any forum in which to seek innocent spouse relief before a court enters a financially damaging judgment or, in rare cases, a taxpayer loses his or her home to foreclosure. At the same time, taxpayers forced to raise their innocent spouse claims in Tax Court will be deprived of a *de novo* scope of review that would be available in other federal courts.

Legislation is needed to clarify that the statutory language of IRC § 6015, which confers Tax Court jurisdiction “in addition to any other remedy provided by law,” does not give the Tax Court exclusive jurisdiction to determine innocent spouse claims and that U.S. district courts, bankruptcy courts, and the U.S. Court of Federal Claims may also consider whether innocent spouse relief should be granted.<sup>4</sup>

## RECOMMENDATION

- Amend IRC §§ 6015 and 66 to clarify that taxpayers are entitled to raise innocent spouse relief as a defense in proceedings brought under any provision of Title 26 (including §§ 6213, 6320, 6330, 7402, 7403, and 7422) and in cases arising under Title 11 of the United States Code.

3 *United States v. Boynton*, 99 A.F.T.R.2d (RIA) 920 (S.D. Cal. 2007) (IRC § 7402 suit to reduce an assessment to judgment); *United States v. Cawog*, 97 A.F.T.R.2d (RIA) 3069 (W.D. Pa. 2006) (IRC § 7403 suit to foreclose on federal tax liens); *In re Mikels*, 524 B.R. 805 (Bankr. S.D. Ind. 2015) (bankruptcy proceeding); and *Chandler v. United States*, 338 F. Supp. 3d 592 (N.D. Tex. 2018) (refund suit).

4 As noted above, IRC § 6015(e)(7) provides that “[a]ny review of a determination under this section shall be reviewed *de novo* by the Tax Court.” The National Taxpayer Advocate agrees that the standard and scope of Tax Court review of innocent spouse cases should be *de novo*. However, the new provision could be construed as conferring exclusive jurisdiction on the Tax Court to hear innocent spouse claims, which would be inconsistent with IRC § 6015(e)(1)(A). For this reason, the National Taxpayer Advocate recommends clarifying that the scope and standard of review are *de novo* in innocent spouse cases adjudicated by the Tax Court “or other court of competent jurisdiction,” thereby avoiding the inference that the Tax Court has exclusive jurisdiction over and innocent spouse claims. See *Provide That the Scope of Judicial Review of Determinations Under IRC § 6015 Is De Novo*, *supra*.

**Legislative Recommendation #50****Fix the Donut Hole in the Tax Court's Jurisdiction to Determine Overpayments by Non-Filers With Filing Extensions****SUMMARY**

- *Problem:* A “donut hole” in the Tax Court’s jurisdiction may prevent it from reviewing some refund claims. This unusual situation arises when taxpayers overpay their tax obligations, request a six-month filing extension, do not file a return, and later receive a notice of deficiency. The Tax Court’s unclear authority to review these refund claims harms taxpayers, whose recourse to judicial oversight should not be limited because of ambiguity in the statutory framework governing Tax Court jurisdiction.
- *Solution:* Amend IRC § 6512(b)(3) so the Tax Court has clear jurisdiction to review refund claims by taxpayers affected by the current donut hole.

**PRESENT LAW**

IRC § 6511(a) provides that the limitations period for filing a claim for refund generally expires two years after paying the tax or three years after filing the return, whichever is later. The amount a taxpayer can recover is limited to amounts paid within the applicable lookback period provided by IRC § 6511(b)(2). If the claim was filed within three years of the return, then the lookback period is three years, plus any filing extension. If the claim wasn’t filed within three years of the return or the taxpayer never filed a return, the lookback period is two years.

When a taxpayer does not file a return, the IRS sometimes sends a notice of deficiency to assess additional tax. A notice of deficiency gives the taxpayer the right to petition the United States Tax Court, and if the taxpayer timely does so, then the Tax Court generally has jurisdiction under IRC § 6512(b) to determine whether the taxpayer is due a refund for the tax year at issue, provided the tax was paid within the applicable lookback period under IRC § 6511(b). Under IRC § 6512(b), if the taxpayer did not file a return before receiving the notice of deficiency, the date on the notice of deficiency becomes the hypothetical date of the taxpayer’s refund claim, and the two- or three-year lookback period in IRC § 6511(b)(2) runs from the date the IRS mailed the notice of deficiency. Absent a special rule, the Tax Court would have no jurisdiction to award refunds to non-filers who are issued a notice of deficiency more than two years after paying the tax.

However, the flush language of IRC § 6512(b)(3) provides just such a rule. It says that certain taxpayers who do not file a tax return are entitled to a three-year look-back period. Before Congress amended IRC § 6512 to add this special rule, a taxpayer who had not filed a return before the IRS mailed a notice of deficiency was entitled only to a two-year lookback period. But Congress, seeking to extend the lookback period available to such non-filing taxpayers, provided that if a notice of deficiency is mailed “during the third year after the due date (with extensions) for filing the return,” and if no return was filed before the notice of deficiency was mailed, the lookback period is three years.

This special rule contains an unintended glitch. In the case of a non-filer who had requested an extension of time to file and then received a notice of deficiency, the words “with extensions” could delay by six months the beginning of the “third year after the due date.” As a result, if the IRS mailed a notice of deficiency before the beginning of the third year, the Tax Court would not have jurisdiction to look back more than two years from the mailing of the notice of deficiency, and thus would not be able to consider any overpayment that had been paid on the original due date of the return, usually April 15. Thus, there is a six-month “donut hole” during which the IRS can send a notice of deficiency without triggering the Tax Court’s jurisdiction to consider the taxpayer’s claim for refund.

*Example:* John Doe had made estimated tax payments in excess of his tax liability by April 15, 2016,<sup>1</sup> the original filing deadline for a 2015 tax return. He had requested a six-month extension of time to file but did not file a return. On July 2, 2018, the IRS mailed him a notice of deficiency for the 2015 tax year. He responded to the notice by petitioning the Tax Court and explaining the notice was incorrect because he had paid the asserted deficiency. He then filed a tax return showing he had overpaid his tax and was due a refund. Because Mr. Doe did not file a return, IRC § 6512 only permits the Tax Court to refund payments made within two years of the date on the notice of deficiency, without regard to extensions (*i.e.*, for taxes paid on or after July 2, 2016). This rule would not help Mr. Doe because he paid his taxes on April 15, 2016, which is more than two years before the date the notice of deficiency was mailed on July 2, 2018.

The special rule provided by the flush language of IRC § 6512 would also not help Mr. Doe, because it would only apply if the IRS had mailed the notice of deficiency during the third year after the due date of his return (with extensions) (*i.e.*, the year beginning after October 15, 2018). Because the IRS mailed his notice of deficiency before the third year had begun, the special rule did not apply, and John Doe could not get his refund.

## REASONS FOR CHANGE

According to the legislative history, Congress enacted the special rule of IRC § 6512(b)(3) to put non-filers who receive notices of deficiency after the two-year lookback period on the same footing as taxpayers who file returns before the IRS mails the notice of deficiency. The special rule was supposed to allow non-filers “who receive a notice of deficiency and file suit to contest it in Tax Court during the third year after the return due date, to obtain a refund of excessive amounts paid within the 3-year period prior to the date of the deficiency notice.”<sup>2</sup>

However, the statute as written may not fix the problem it was enacted to solve. In *Borenstein*, the Tax Court concluded that it had no jurisdiction to determine a non-filer’s overpayment because the non-filer had requested a six-month extension to file and the IRS mailed the notice of deficiency during the first six months of the third year following the original due date — after the second year following the due date (without extensions) and before the third year following the due date (with extensions).<sup>3</sup> Thus, the court found that the special rule of IRC § 6512(b)(3) leaves a donut hole in its jurisdiction. Although the U.S. Court of Appeals for the Second Circuit reversed the Tax Court’s decision, the Tax Court is not required to follow the Second Circuit’s decision in cases arising in other circuits.<sup>4</sup> Thus, unless the Tax Court revisits its decision, a legislative fix is still needed.

Although this problem only affects the relatively limited number of taxpayers who request a six-month filing extension and then, for whatever reason, do not file a return before receiving a notice of deficiency, Congress felt it was important to provide non-filers with this special rule. We believe it is important to highlight this unintended result and recommend a solution.

1 Under IRC § 6513(b)(2), for a calendar-year taxpayer, estimated taxes are deemed paid on April 15 in the year following the close of the tax year to which the tax is allowable as a credit.

2 H.R. REP. NO. 105-220, at 701 (1997) (CONF. REP.).

3 *Borenstein v. Comm’r*, 149 T.C. 263 (2017), *rev’d*, 919 F.3d 746 (2d Cir. 2019). See also *O’Connell v. Comm’r*, No. 6587-20 (T.C. May 20, 2021) (settled in accordance with the *Borenstein* precedent).

4 *Golsen v. Comm’r*, 54 T.C. 742, 757 (1970), *aff’d*, 445 F.2d 985 (10th Cir. 1971).

**RECOMMENDATION<sup>5</sup>**

- Amend IRC § 6512(b)(3) to clarify that when the IRS mails a notice of deficiency to a non-filer after the second year following the due date of the return (without regard to extensions), the lookback period for filing a claim for refund or credit is three years (plus the period of any extension of time for filing a return) from the date of the notice of deficiency.

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5 For more detail, see National Taxpayer Advocate 2018 Annual Report to Congress (Legislative Recommendation: *Tax Court Jurisdiction: Fix the Donut Hole in the Tax Court's Jurisdiction to Determine Overpayments by Non-Filers With Filing Extensions*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/07/ARC18\\_Volume1\\_LR\\_05\\_TaxCourt.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/07/ARC18_Volume1_LR_05_TaxCourt.pdf); Nina E. Olson, *The Second Circuit in Borenstein Helped to Close the Gap in the Tax Court's Refund Jurisdiction, but Only for Taxpayers in that Circuit*, NATIONAL TAXPAYER ADVOCATE BLOG, <https://www.taxpayeradvocate.irs.gov/news/ntablog-the-second-circuit-in-borenstein-helped-to-close-the-gap-in-the-tax-courts-refund-jurisdiction-but-only-for-taxpayers-in-that-circuit/> (Apr. 24, 2019). This recommendation could be implemented by revising the flush language in IRC § 6512(b)(3) to insert the word “original” before “due date” and striking the parenthetical phrase “(with extensions).”

## MISCELLANEOUS RECOMMENDATIONS

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### Legislative Recommendation #51

## Restructure the Earned Income Tax Credit (EITC) to Make It Simpler for Taxpayers and Reduce Improper Payments

### SUMMARY

- *Problem:* The Earned Income Tax Credit (EITC) is one of the federal government's largest anti-poverty programs, but its eligibility requirements are complex. As a result, millions of eligible taxpayers fail to claim the EITC, while other taxpayers claim amounts for which they are not eligible, leading to a high "improper payments" rate.
- *Solution:* Simplify the EITC by breaking it out into a "worker credit" and a "child credit," revising the definition of a "qualifying child," and making certain other structural changes.

### PRESENT LAW

The EITC is a refundable credit for low- and moderate-income working individuals and families. Eligibility for the EITC and the amount of EITC a taxpayer may claim are based on a variety of factors, including the taxpayer's earned income, the number of qualifying children, and the taxpayer's filing status.<sup>1</sup> Additionally, the EITC is not available to taxpayers who have disqualified income (*e.g.*, investment income such as dividends, capital gains, and rental income) that exceeds the applicable limit (\$10,000 for tax year (TY) 2021). For TY 2021, the EITC plateaued at \$6,728 for married taxpayers filing jointly with three qualifying children whose sole income was earnings from work between \$14,950 and \$25,499.<sup>2</sup>

An individual must meet three primary requirements to be a taxpayer's "qualifying child" for the EITC.<sup>3</sup> First, the individual must have a specific blood or legal relationship to the taxpayer.<sup>4</sup> Second, the individual must share a residence in the United States with the taxpayer for more than half the year.<sup>5</sup> Third, the individual must be under the age of 19 (or under age 24 if a full-time student) or be permanently and totally disabled.<sup>6</sup>

Taxpayers without qualifying children may also claim the EITC.<sup>7</sup> Prior to 2021, the childless EITC was limited to taxpayers aged 25 to 64. In TY 2020, the credit plateaued at \$538 for married-filing-jointly taxpayers with no qualifying children earning between \$7,000 and \$14,699, and at the same \$538 amount for single taxpayers without qualifying children earning between \$7,000 and \$8,799. The American Rescue Plan Act of 2021 (ARPA) raised the maximum EITC from \$538 to \$1,502 and raised the income eligibility cap to \$27,379 for married taxpayers filing jointly and to \$21,429 for single taxpayers.<sup>8</sup> ARPA temporarily expanded the age range of workers with no qualifying children who are eligible for the EITC to include younger adults aged 19 to 24 (excluding students under 24 attending school at least part time) and

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1 IRC § 32.

2 IRS, Pub. 596, Earned Income Credit (EIC) 33-34 (Jan. 2021).

3 Where there are competing claims for the same child, "tie breaker" rules prioritize the claims. IRC § 152(c)(4)(B).

4 IRC §§ 32(c)(3)(A), 152(c)(2).

5 IRC § 32(c)(3)(C).

6 IRC §§ 32(c)(3)(A), 152(c)(3). The individual must also have a Social Security number that is valid for employment. IRC § 32(c)(3)(D), (m).

7 IRC § 32(c)(1)(A)(ii).

8 ARPA, Pub. L. No. 117-2, § 9621, 135 Stat. 4, 152-153 (2021) (codified in IRC § 32(n)).



temporarily removed the upper age limit (previously age 64) for TY 2021.<sup>9</sup> Qualified former foster youth and qualified homeless youth also temporarily became eligible to claim the EITC at age 18.<sup>10</sup>

Unemployment compensation (UC) is based on a taxpayer's earned income and is included in adjusted gross income (AGI),<sup>11</sup> but it is generally *not included* in earned income and thus does not count in computing the amount of EITC for which a taxpayer is eligible.<sup>12</sup>

## REASONS FOR CHANGE

Enacted in 1975, the EITC is one of the federal government's largest anti-poverty programs for low-income workers.<sup>13</sup> For TY 2021, taxpayers filed about 30 million returns claiming EITC benefits worth about \$63 billion.<sup>14</sup> Overall, the EITC is considered to be an effective anti-poverty program, but its eligibility requirements are complex. As a result, the program suffers from a relatively high rate of improper payments that could be reduced if the eligibility requirements were simplified.<sup>15</sup> In addition, the EITC was enacted at a time when families with biological or legal relationships with the claimed children predominated. Modernizing the eligibility requirements to recognize non-traditional families could increase the participation rate among eligible taxpayers, allow guardians other than parents to receive benefits when they are the principal caretakers, and reduce improper payments. Finally, the credit should be made available to taxpayers who enter the workforce at age 19 and taxpayers who remain in the workforce after age 64.

### Restructure the EITC as Two Credits: A Worker Credit and a Child Credit

The National Taxpayer Advocate recommends restructuring the EITC into two credits where the taxpayer is claiming qualifying children: (i) a refundable *worker credit* based on each individual worker's earned income, irrespective of the presence of a qualifying child, and (ii) a refundable *child credit* that would reflect the costs of caring for one or more children.

#### Worker Credit

Much like the current EITC, the credit would phase in as a percentage of earned income, reach a plateau, and then phase out.<sup>16</sup> Unlike the current EITC, the credit amount would depend solely on income and would not vary based on whether the taxpayer is claiming one or more qualifying children. Increasing the worker component of the EITC would provide a greater incentive to work, which is a main objective of the credit. This structure also would target the credit to the lowest-earning taxpayers, based on AGI (a broader measure

<sup>9</sup> IRC § 32(n).

<sup>10</sup> IRC § 32(n)(1)(B)(iii).

<sup>11</sup> IRC § 85; Treas. Reg. § 1.85-1(b)(1). Unemployment compensation generally includes any amount received under an unemployment compensation law of the United States or a state.

<sup>12</sup> IRC § 32(c)(2); Treas. Reg. § 1.32-2(c)(2).

<sup>13</sup> See IRS, IR-2022-20, EITC Awareness Day: Important changes mean more people qualify for credit that helps millions of Americans (Jan. 28, 2022), <https://www.irs.gov/newsroom/eitc-awareness-day-important-changes-mean-more-people-qualify-for-credit-that-helps-millions-of-americans>.

<sup>14</sup> IRS, Compliance Data Warehouse, Individual Return Transaction File Tax Year 2021 returns (Oct. 2022).

<sup>15</sup> An improper payment is defined as "any payment that should not have been made or that was made in an incorrect amount (including overpayments and underpayments) under statutory, contractual, administrative, or other legally applicable requirements" and "any payment to an ineligible recipient." Improper Payments Elimination and Recovery Act of 2010, Pub. L. No. 111-204, § 2(e), 124 Stat. 2224 (2010) (amending Improper Payments Information Act of 2002, Pub. L. No. 107-300, 116 Stat. 2350 (2002) and striking § 2(f) and adding § (f)(2)). For fiscal year 2021, the IRS estimates that nearly 28 percent of the total EITC program payments were improper. Payment Accuracy FY 2021 dataset at <https://www.paymentaccuracy.gov/payment-accuracy-the-numbers/> (last visited Dec. 6, 2022).

<sup>16</sup> For examples regarding how to structure a per-worker credit, see ELAINE MAAG, INVESTING IN WORK BY REFORMING THE EARNED INCOME TAX CREDIT (2015).

of income that includes unearned income like capital gains, dividends, rents, and royalties).<sup>17</sup> This would be similar to the current EITC provision that denies the credit to taxpayers with excessive investment income.<sup>18</sup>

This change could also substantially reduce improper payments. The IRS receives Forms W-2 and other information reporting documents directly from employers and other payors of income. For that reason, it can accurately verify income amounts for EITC recipients who are employees, by far the largest group of EITC claimants.<sup>19</sup>

## Unemployment Compensation

Taxpayers who receive UC based on their employment earnings cannot use their UC income to qualify for the EITC. The apparent rationale for not counting UC is that the EITC was designed largely to provide a work incentive. However, UC is paid exclusively to individuals who were working and became separated from their jobs due to no fault of their own. Most recently, millions of individuals who had been employed lost their jobs during the COVID-19 pandemic when certain segments of the economy, such as restaurants, hotels, and airlines, substantially reduced their workforces. In other instances, local disasters such as hurricanes adversely affect segments of the economy and lead to mass layoffs. Because UC is effectively a replacement for a portion of the wages working individuals would have earned if they had not been separated from their jobs and because UC benefits are only paid for a limited number of months, treating UC as earned income solely for purposes of the EITC would maintain the nexus between working and receiving EITC.<sup>20</sup>

## Child Credit

The child credit would be designed as a fixed amount per qualifying child, subject to an AGI phase-out, and would replace the portion of the existing EITC that is based on the number of qualifying children taken into account for determining the amount of a taxpayer's EITC. This could be accomplished by retaining ARPA's changes to the Child Tax Credit (CTC) and by modernizing the definition of a qualifying child. Some of ARPA's CTC changes include increasing the maximum credit amount from \$2,000 to \$3,000 (\$3,600 for children under six), making the credit fully refundable for certain taxpayers, increasing a qualifying child's age from 17 to 18, and changing the income phase-outs.

## Modernize the Definition of a Qualifying Child

The qualifying child rules of the current EITC structure may not reflect real-life living arrangements. A 2016 study by the Tax Policy Center found that the number of households made up of "traditional families" (married parents with only biological children) has declined, while alternative family types, such as families led by single parents or cohabitating adults, have increased.<sup>21</sup> Only 51.6 percent of children living in families with incomes at or below 200 percent of the Federal Poverty Level were in families headed by married couples.

17 Some experts caution that without a minimum wage, employers would reduce and capture the benefit of an increased EITC. See AUSTIN NICHOLS & JESSE ROTHSTEIN, *THE EARNED INCOME TAX CREDIT, ECONOMICS OF MEANS-TESTED TRANSFER PROGRAMS IN THE UNITED STATES*, vol. 1, at 137 (Robert A. Moffitt ed., 2016). Therefore, many proposals couple an increased childless EITC or worker credit with an increased minimum wage. See ISABEL V. SAWHILL & QUENTIN KARPILOW, *RAISING THE MINIMUM WAGE AND REDESIGNING THE EITC*, BROOKINGS INST. (Jan. 30, 2014), <https://www.brookings.edu/research/raising-the-minimum-wage-and-redesigning-the-eitc>.

18 IRC § 32(i).

19 A relatively small percentage of EITC claimants are self-employed individuals. The IRS receives somewhat less information from third-party payors with respect to self-employed individuals.

20 We recognize an unintended consequence of including UC in AGI is that it may diminish a taxpayer's EITC claim, and in some instances, may make taxpayers ineligible to claim the EITC.

21 ELAINE MAAG ET AL., *INCREASING FAMILY COMPLEXITY AND VOLATILITY: THE DIFFICULTY IN DETERMINING CHILD TAX BENEFITS 10* (2016), <https://www.urban.org/research/publication/increasing-family-complexity-and-volatility-difficulty-determining-child-tax-benefits>. See also National Taxpayer Advocate 2016 Annual Report to Congress 334 (Legislative Recommendation: *Tax Reform: Restructure the Earned Income Tax Credit and Related Family Status Provisions to Improve Compliance and Minimize Taxpayer Burden*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC16\\_Volume1\\_LR\\_02\\_TaxReform.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC16_Volume1_LR_02_TaxReform.pdf).

Low-income children were more likely to live with a single parent or in a multigenerational household, a cohabiting household, or a family with at least one non-biological child, as compared with higher income families.<sup>22</sup>

That point bears emphasis: Nearly half of all low-income children now live in non-traditional families. To ensure the target population receives the EITC, the eligibility rules should be revised. For example, instead of focusing on biological relationships, the definition of a qualifying child should consider which adult provides primary care for the child. This could include factors such as who makes medical appointments for the child, who prepares meals for the child, and who is the contact for the child at school. Since the EITC is a credit for lower income families, its eligibility requirements must accurately reflect the target population.<sup>23</sup>

## RECOMMENDATIONS

- Separate the refundable EITC into two components: a worker credit and a child credit.
- Permanently expand the expiring age eligibility for the EITC to individuals who have attained age 19 (age 18 in the case of qualified former foster youth or qualified homeless youth and age 24 for specified students), with no upper age limit.
- Amend IRC § 32(c)(2)(A)(i) to include unemployment compensation as EITC-qualifying earned income.
- Amend IRC § 32(c) to modernize the definition of a qualifying child to better reflect evolving family units.<sup>24</sup>

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22 ELAINE MAAG ET AL., INCREASING FAMILY COMPLEXITY AND VOLATILITY: THE DIFFICULTY IN DETERMINING CHILD TAX BENEFITS 10 (2016), <https://www.urban.org/research/publication/increasing-family-complexity-and-volatility-difficulty-determining-child-tax-benefits>.

23 For more discussion on modernizing the definition of “qualifying child,” see National Taxpayer Advocate Fiscal Year 2020 Objectives Report to Congress vol. 3, at 17-19 (*Earned Income Tax Credit: Making the EITC Work for Taxpayers and the Government*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/JRC20\\_Volume3.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/JRC20_Volume3.pdf).

24 Relevant considerations should include which adult performs caregiving and makes caregiving decisions for the child, including factors like who prepares meals, who transports the child to school, and who makes medical appointments for the child. For a more detailed discussion on modernizing the definition of a “qualifying child,” see National Taxpayer Advocate Fiscal Year 2020 Objectives Report to Congress vol. 3, at 17-19 (*Earned Income Tax Credit: Making the EITC Work for Taxpayers and the Government*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/JRC20\\_Volume3.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/JRC20_Volume3.pdf).

**Legislative Recommendation #52****Adopt a Consistent and More Modern Definition of “Qualifying Child” Throughout the Internal Revenue Code****SUMMARY**

- *Problem:* Numerous provisions in the IRC use the term “qualifying child,” but they contain several different definitions of the term. These inconsistent definitions are confusing to taxpayers. The different definitions make compliance difficult, causing some taxpayers to fail to claim tax benefits for which they qualify and other taxpayers to claim tax benefits for which they do not qualify, subjecting them to liability for additional tax, penalties, and interest. Furthermore, the relationship test embedded in the definitions has not been updated to reflect the rise of non-traditional families and childcare arrangements, preventing primary caregivers from receiving certain benefits.
- *Solution:* Adopt a consistent and more modern definition of the term “qualifying child” throughout the IRC by using a consistent age requirement, removing or replacing the relationship test to expand eligibility to modern families, and revising the definition of a “qualifying relative” to allow a taxpayer to claim the qualifying child of another taxpayer who is entitled to claim the child but does not do so.

**PRESENT LAW**

IRC § 152 broadly defines a “dependent” as a “qualifying child” or a “qualifying relative.”<sup>1</sup> The term “qualifying child” is further defined in IRC § 152(c). This definition was added to the IRC as part of the Working Families Tax Relief Act of 2004.<sup>2</sup> At that time, Congress concluded that the use of multiple definitions contributed to a lack of clarity.<sup>3</sup> Despite these efforts, there are still parts of the IRC that deviate from the uniform definition.

IRC § 152(c) is meant to provide a common definition of “qualifying child” for five tax benefits: (i) IRC § 2(b), head-of-household (HoH) filing status; (ii) IRC § 21, the Child and Dependent Care Credit; (iii) IRC § 24, the Child Tax Credit (CTC); (iv) IRC § 32, the Earned Income Tax Credit (EITC); and (v) IRC § 151, the dependency exemption. This “uniform” definition also affects eligibility for other provisions in the IRC like premature distributions from tax-favored accounts for education or medical treatment, dependent care assistance programs under IRC § 129, and family member fringe benefits under IRC § 132.

Several IRC provisions that use the term “qualifying child” adopt a different definition. For example, the EITC may be claimed with respect to children under age 19 (or under age 24 if a student) while the CTC may only be claimed with respect to children under age 17.<sup>4</sup> The term “qualifying child” and the relationships described in IRC § 152(c)(2) encompass different types of familial relationships, including grandchildren for purposes of the EITC. In the case of a taxpayer who is married but seeking to be treated as unmarried for purposes of claiming HoH filing status, however, only a son or daughter meets the definition of a “qualifying child” – grandchildren do not qualify.<sup>5</sup> This differs from the relationships covered by the term “qualifying relative” in IRC § 152(d). In addition, IRC § 152(d)(1)(D), as currently written, excludes children who could otherwise be claimed as qualifying children by another taxpayer.

<sup>1</sup> IRC § 152 (a).

<sup>2</sup> Pub. L. No. 108-311, § 201, 118 Stat. 1166, 1169-1165 (2004).

<sup>3</sup> Toni Robinson, *Problems with the Uniform Definition of a Qualifying Child*, ABA SECTION OF TAXATION NEWS QUARTERLY, Vol. 26, No. 1 (Fall 2006).

<sup>4</sup> IRC §§ 24(c)(4) and 152(c)(3).

<sup>5</sup> IRC §§ 152 and 7703.

## REASONS FOR CHANGE

### Consistency Avoids Confusion and Eases Administration

The deviations from a uniform definition are needlessly confusing. Not surprisingly, many taxpayers do not understand the differences in requirements. They may assume that if a child is “qualifying” for purposes of one IRC provision, the child is qualifying for all IRC provisions. Conversely, they may assume that if a child is not qualifying for purposes of one IRC provision, the child is not a “qualifying child” for any IRC provisions.<sup>6</sup> This confusion can result in inaccuracies on their tax returns, which may lead to audits and additional tax liabilities, plus penalties and interest charges or loss of benefits intended by Congress. It can also result in a failure to claim tax benefits. For example, in tax year 2019, about 14 percent of taxpayers with children who were eligible to receive EITC benefits did not claim them.<sup>7</sup>

Confusion also increases the administrative burden on the IRS, as it must program its return processing systems using different definitions for different provisions, it must program its audit selection models to distinguish among conflicting definitions, and it must devote audit and collection resources to reporting inaccuracies that exist solely because taxpayers and even some tax preparers confuse the various definitions when filling out tax returns.

### The Relationship Test Prevents Primary Caregivers From Receiving Certain Tax Benefits

Eligibility rules for EITC and certain other tax credits were written when two-parent households predominated. Living arrangements have evolved. A 2016 study by the Tax Policy Center found that only 51.6 percent of children living in families with incomes at or below 200 percent of the Federal Poverty Level were in families headed by married couples.<sup>8</sup> Low-income children were more likely to live with a single parent or in a multigenerational household, a cohabiting household, or a family with at least one non-biological child, as compared with higher income families.<sup>9</sup>

When children are raised or informally fostered by nonqualified relatives or family friends, EITC and CTC cannot be properly claimed.<sup>10</sup> Taxpayers can only receive the child-related portion of EITC and CTC when they have a “qualifying child,” not a “qualifying relative.”<sup>11</sup> The IRC § 152(c)(2) relationship test for a qualifying child restricts eligibility to only a few close relatives.<sup>12</sup> This test mainly excludes children who live in low-income households.<sup>13</sup> The relationship test excludes two million children for purposes of some CTC benefits.<sup>14</sup> A child who does not live with a sufficiently close relative cannot be claimed by anyone.<sup>15</sup>

6 Elaine Maag, H. Elizabeth Peters, and Sara Edelstein, *Increasing Family Complexity and Volatility: The Difficulty in Determining Child Tax Benefits*, URBAN INSTITUTE, (Mar. 3, 2016), <https://www.urban.org/research/publication/increasing-family-complexity-and-volatility-difficulty-determining-child-tax-benefits>.

7 Combined EITC/CP09-27 recipient files, CPS ASEC, Form 1040, and Form W-2, tax year 2019. Release authorization CBDRB-FY2022-CES010-010.

8 Elaine Maag, H. Elizabeth Peters, and Sara Edelstein, *Increasing Family Complexity and Volatility: The Difficulty in Determining Child Tax Benefits*, URBAN INSTITUTE, (Mar. 3, 2016), <https://www.urban.org/research/publication/increasing-family-complexity-and-volatility-difficulty-determining-child-tax-benefits>.

9 *Id.*

10 Ariel Jurow Kleiman, *Revolutionizing Redistribution: Tax Credits and the American Rescue Plan*, YALE LAW JOURNAL FORUM, Vol. 131, (Oct. 12, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3941495](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3941495).

11 IRC §§ 24, 32, and 152.

12 IRC § 152(c).

13 Jacob Goldin and Katherine Micheltore, *Who Benefits from the Child Tax Credit?*, NATIONAL BUREAU OF ECONOMIC RESEARCH (Oct. 2021), <https://www.nber.org/papers/w27940>.

14 *Id.*

15 IRC §§ 24(c), 152(c); Ariel Jurow Kleiman, *Revolutionizing Redistribution: Tax Credits and the American Rescue Plan*, YALE LAW JOURNAL FORUM, Vol. 131, (Oct. 12, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3941495](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3941495).

Similarly, the relationship rules where a taxpayer is seeking to be treated as unmarried for the purposes of HoH filing status prevent the taxpayer from claiming grandchildren.<sup>16</sup>

Congress can address these shortcomings by modernizing and adopting a uniform definition of a qualifying child, as the current definition often no longer reflects real-life living arrangements. The definitions of a qualifying child should be amended to encompass more types of families. The closely defined relationship test of IRC § 152(c)(2) should be removed entirely or replaced with a holistic primary caregiver standard.<sup>17</sup> The residency test and other requirements should remain in place to ensure the tax benefits are going to taxpayers providing care to children in their household.<sup>18</sup> The tiebreaker rules of IRC § 152(c)(4) should also remain in place for situations where two or more taxpayers could claim the same qualifying child.

To allow heads of non-traditional families to claim the dependency exemption with respect to children they care for, another amendment to the current IRC § 152 rules would make a significant difference – adding the words “claimed as” to IRC § 152(d)(1)(D) so that the term “qualifying relative” means an individual “who is not *claimed as* a qualifying child of such taxpayer or of any other taxpayer for any taxable year in the calendar year in which such taxable year begins.” That language would also conform to the language used in IRC § 152(c)(4)(C) regarding when two or more can claim the same qualifying child. If the parents may claim a qualifying child but neither parent does so, the child may be claimed as the qualifying child of another taxpayer if the adjusted gross income of that taxpayer is higher than the highest adjusted gross income of either parent of the individual.<sup>19</sup>

## RECOMMENDATIONS

- Adopt a consistent and more modern definition of “qualifying child” throughout the IRC.
- Use a consistent age when defining “qualifying child.”
- Modernize the definition of a qualifying child in IRC § 152(c) to reflect evolving family units by removing IRC §§ 152(c)(1)(A) and 152(c)(2).
- Replace the relationship test of IRC § 152(c)(1)(A) and IRC § 152(c)(2) with a primary caregiver standard.
- Amend IRC § 152(d)(1)(D) so that the term “qualifying relative” means an individual “who is not *claimed as* a qualifying child of such taxpayer or of any other taxpayer for any taxable year in the calendar year in which such taxable year begins.”

<sup>16</sup> IRC §§ 2(b), 152(f)(1), and 7703(b).

<sup>17</sup> Ariel Jurow Kleiman, *Revolutionizing Redistribution: Tax Credits and the American Rescue Plan*, YALE LAW JOURNAL FORUM, Vol. 131, (Oct. 12, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3941495](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3941495).

<sup>18</sup> IRC §§ 152(c)(1)(B)-(E).

<sup>19</sup> IRC § 152(c)(4)(C).



**Legislative Recommendation #53****Allow Taxpayers the Option of Using Prior Year Income to Claim the Earned Income Tax Credit (EITC) During Federally Declared Disasters****SUMMARY**

- *Problem:* A low-income worker who loses his job due to a federally declared disaster may suffer a double financial hit – loss of wage income and loss of Earned Income Tax Credit (EITC) benefits. On several occasions, Congress has mitigated the EITC impact by allowing affected individuals to claim EITC benefits on the basis of their prior year's income, but on other occasions, similarly affected taxpayers have not received this relief.
- *Solution:* Establish a general rule allowing taxpayers in a federally declared disaster area the option of claiming EITC benefits on the basis of their prior-year earned income.

**PRESENT LAW**

The EITC is a refundable credit for low- and moderate-income working families. Eligibility for the EITC and the amount of EITC to which a taxpayer is entitled are based on several factors, including the taxpayer's earned income, the number of qualifying children, and the taxpayer's filing status.<sup>1</sup> Taxpayers without qualifying children may be eligible for the "childless EITC."<sup>2</sup>

IRC § 165(i)(5) defines a "Federally declared disaster" as any disaster determined by the President to warrant federal assistance under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, and it defines a "disaster area" as any area so determined to warrant federal assistance.

On numerous occasions when the President has declared a disaster, Congress has passed legislation to give affected taxpayers who earn less income in the disaster year than the prior year the option of using their prior-year income to calculate their EITC benefits.<sup>3</sup> This provision is referred to as the "EITC lookback rule." Most recently, Congress authorized the EITC lookback rule for tax years 2020 and 2021 to provide relief from the COVID-19 pandemic.<sup>4</sup>

**REASONS FOR CHANGE**

In general, the EITC is designed to incentivize work, and its benefits are only available to individuals who have earned income. During major disasters like the COVID-19 pandemic or hurricanes, many employed individuals experience a disruption in work, a furlough, or a job termination. If these taxpayers had earned income levels that qualified them for EITC benefits, they may suffer a double financial hit. They not only lose the income from their jobs, but because they are no longer earning income, they also may lose their EITC benefits.

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<sup>1</sup> IRC § 32.

<sup>2</sup> *Id.*

<sup>3</sup> *See, e.g.,* American Rescue Plan Act, Pub. L. No. 117-2, § 9626, 135 Stat. 4, 157 (2021); Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 211, Div. EE, Title II (2020); Disaster Tax Relief and Airport and Airway Extension Act of 2017, Pub. L. No. 115-63, § 504, 131 Stat. 1168, 1183 (2017); Heartland Disaster Tax Relief of 2008, Pub. L. No. 110-343, Div. C, Title VII, Subtitle A, § 701, 122 Stat. 3765, 3912 (2008); Katrina Emergency Tax Relief Act of 2005, Pub. L. No. 109-73, Title IV, § 406, 119 Stat. 2016, 2028 (2005).

<sup>4</sup> *Id.*



The EITC lookback rule is designed to provide relief to taxpayers in this circumstance. To illustrate, assume a mother who was consistently employed for several years was laid off when the COVID-19 pandemic struck in early 2020. As a result, she did not have sufficient 2020 earned income to qualify for significant EITC benefits. The EITC lookback rule provided relief by allowing her to qualify for EITC benefits on the basis of her income in 2019.

To date, Congress has authorized use of the EITC lookback rule on a disaster-by-disaster basis. This one-off approach leaves taxpayers (and the IRS) with uncertainty and means that relief is only provided in circumstances where Congress takes an affirmative act. To ensure that all individuals affected by a federally declared disaster receive relief, the National Taxpayer Advocate recommends that Congress revise IRC § 32 to permanently provide this election to all taxpayers who are affected by a federally declared disaster as defined by IRC § 165(i)(5).

## RECOMMENDATION

- Amend IRC § 32 to allow taxpayers who are affected by a federally declared disaster as defined by IRC § 165(i)(5) to elect the use of their prior year's earned income to calculate and claim the EITC.<sup>5</sup>

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<sup>5</sup> For legislative language generally consistent with this recommendation, see COVID-19 Earned Income Act, S. 3542 & H.R. 6762, 116th Cong. (2020), except that our recommendation is to make relief permanent rather than specific to a single tax year.

**Legislative Recommendation #54****Exclude Taxpayers in Specific Circumstances From the Requirement to Provide a Social Security Number for Their Children to Claim the Child Tax Credit****SUMMARY**

- *Problem:* In 2017, Congress enacted legislation that prohibits taxpayers from claiming a child for purposes of the child tax credit (CTC) if the child does not have a Social Security number (SSN). The intent was to ensure that only children who are U.S. citizens could be claimed. However, there are at least three categories of children who are U.S. citizens but do not have SSNs, and the change in law had the unintended effect of preventing families from receiving CTC benefits with respect to these children.
- *Solution:* Allow children who do not have SSNs to be claimed for purposes of the CTC in the limited circumstances described below, provided they meet all other eligibility requirements.

**PRESENT LAW**

The Tax Cuts and Jobs Act (TCJA) amended IRC § 24 to require a taxpayer claiming the CTC to provide a SSN valid for employment for a qualifying child.<sup>1</sup>

IRC § 1402(g) exempts members of certain religious faiths from the requirement to pay self-employment tax if certain conditions are met. An individual may apply for an exemption from the self-employment tax requirements:

... if he is a member of a recognized religious sect or division thereof and is an adherent of established tenets or teachings of such sect or division by reason of which he is conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement or makes payments toward the cost of, or provides services for, medical care (including the benefits of any insurance system established by the Social Security Act).

To claim the exemption, the individual must apply on IRS Form 4029, Application for Exemption From Social Security and Medicare Taxes and Waiver of Benefits.<sup>2</sup>

**REASONS FOR CHANGE**

The requirement under IRC § 24 that a qualifying child claimed for the CTC have an SSN valid for employment was intended to prevent a taxpayer whose child is not a U.S. citizen or is not otherwise eligible for an SSN from receiving the CTC. However, the provision is having the unintended effect of disqualifying several taxpayer populations whose dependents do not have SSNs due to unique circumstances but who otherwise meet the requirements for the credit. These populations are being denied a valuable tax benefit that Congress did not intend to deny them. Affected taxpayers include:

- Taxpayers who do not apply for SSNs due to their deeply held religious beliefs, most notably the Amish;
- Taxpayers whose adopted children have not yet received SSNs; and

<sup>1</sup> TCJA, Pub. L. No. 115-97, § 11022(a), 131 Stat. 2054, 2073-2074 (2017) (codified at IRC § 24(h)(7)).

<sup>2</sup> IRC § 1402(g).

- Taxpayers unable to obtain an SSN for a qualifying child because the child was born and died in the same or consecutive tax years.

Prior to the TCJA amendment, IRC § 24 only required a taxpayer claiming a child as a qualifying child for the CTC to provide a taxpayer identification number (TIN) for the child. The IRS provided administrative relief to allow the credit to a taxpayer without a TIN for a qualifying child due to the taxpayer's deeply held religious beliefs. Specifically, taxpayers whose qualifying children did not have an SSN or other TIN due to the taxpayers' deeply held religious beliefs were allowed the credit if the taxpayers indicated on their tax returns that they have an approved Form 4029 establishing that they had met the requirements under IRC § 1402(g).

In certain circumstances, the IRS would request additional information from the taxpayer to prove the age, relationship, and residence of the child. Further, the language in the CTC prior to the TCJA change permitted the IRS to allow the credit for taxpayers whose children only had Adoption Taxpayer Identification Numbers (ATINs), which are tax identification numbers issued for use while waiting to receive SSNs for the adopted children. Now, the IRS is no longer providing administrative relief to allow the CTC if a qualifying child lacks an SSN, unless the taxpayer's child was born and died in the same or consecutive tax years.<sup>3</sup>

The National Taxpayer Advocate believes that the affected taxpayer populations are being treated unjustly because the TCJA language did not provide an exception to the SSN requirement for qualifying children for these specific groups, thereby denying them the CTC to which they are otherwise entitled. Moreover, the IRS is now applying the law inconsistently by allowing an exception for children who were born and died in the same or consecutive tax years while not allowing an exception for similar categories of children.

## RECOMMENDATIONS

- Amend IRC § 24(h)(7) to allow a taxpayer to claim the CTC with respect to a qualifying child without an SSN if the taxpayer meets all other eligibility requirements for the credit and if the taxpayer:
  - Is a member of a recognized religious group and meets the requirements under IRC § 1402(g);
  - Adopted a child (or has a child lawfully placed with the taxpayer for adoption) and provides an ATIN for the qualifying child; or
  - Had a child that was born and died in the same or consecutive tax years.

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<sup>3</sup> The IRS Office of Chief Counsel has opined that the IRS is legally prohibited from allowing the CTC with respect to a child who lacks an SSN because of religious or conscience-based objections. See Program Manager Technical Advice (PMTA), Administration of the Child Tax Credit for Objectors to Social Security Numbers, POSTS-117474-18, PMTA 2019-2 (Mar. 29, 2019). For an in-depth discussion regarding TAS's disagreement with this advice, see *The Tax Filing Season: Hearing Before the H. Subcomm. on Gov't Oversight of the H. Comm. on Ways and Means*, 116th Cong. 22-27 (2019) (testimony of Nina E. Olson, then the National Taxpayer Advocate); National Taxpayer Advocate Fiscal Year 2020 Objectives Report to Congress 48 (Area of Focus: *TAS Will Urge the IRS to Reconsider Its Position on the Application of the Religious Freedom Restoration Act to the Social Security Requirement Under IRC § 24(h)(7), Which Has the Effect of Denying Child Tax Credit Benefits to the Amish and Certain Other Religious Groups*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/JRC20\\_Volume1\\_AOF\\_02.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/JRC20_Volume1_AOF_02.pdf); Nina E. Olson, The IRS's Position on the Application of the Religious Freedom Restoration Act to the Social Security Requirement Under Internal Revenue Code § 24(h)(7) Has the Effect of Denying Child Tax Credit Benefits to the Amish and Certain Other Religious Groups, NATIONAL TAXPAYER ADVOCATE BLOG (June 26, 2019), <https://www.taxpayeradvocate.irs.gov/news/ntablog-the-irss-position-on-the-application-of-the-religious-freedom-restoration-act-to-the-social-security-requirement/>. See also Internal Revenue Manual 3.12.3.26.17.6, TIN Requirements (EC 287) (Apr. 20, 2021).

**Legislative Recommendation #55****Clarify Whether Dependents Are Required to Have Taxpayer Identification Numbers for Purposes of the Credit for Other Dependents****SUMMARY**

- *Problem:* As part of the Tax Cuts and Jobs Act (TCJA), Congress authorized taxpayers to claim a tax credit for “dependents” who do not meet the more stringent requirements of a “qualifying child.” Congress did not require that the dependents have Taxpayer Identification Numbers (TINs), but the IRS has imposed this requirement. This IRS requirement has rendered hundreds of thousands of otherwise qualifying “dependents” ineligible for credit claims.
- *Solution:* Clarify whether a dependent is required to have a TIN to qualify a taxpayer to claim the Credit for Other Dependents (ODC).

**PRESENT LAW**

IRC § 24 authorizes a Child Tax Credit (CTC) of up to \$2,000 per “qualifying child,” of which up to \$1,400 is refundable.<sup>1</sup> The TCJA added a new provision to IRC § 24 that allows a nonrefundable credit of \$500 for each “dependent” who is not a “qualifying child.”<sup>2</sup> This nonrefundable credit is referred to as the ODC.<sup>3</sup>

IRC § 24(e) provides that a “qualifying child” must have a TIN to be claimed under this section. IRC § 24(h)(7) further provides that the qualifying child’s TIN must be a Social Security number (SSN) valid for employment in the United States.

Under IRC § 24(h)(4), the ODC is available for a “dependent of the taxpayer (as defined in section 152).” There is no requirement in IRC § 152 that to be a “dependent,” an individual must have a TIN (either an SSN or an Individual Taxpayer Identification Number). IRC § 24 specifically provides that where a qualifying child’s lack of an SSN prevents a taxpayer from claiming the CTC for that child, the taxpayer may receive the ODC for that child.<sup>4</sup>

**REASONS FOR CHANGE**

Despite the absence of a TIN requirement in the statute, the IRS has taken the position that a dependent must have a TIN to be claimed for purposes of the ODC.<sup>5</sup> The IRS has used its summary assessment authority to disallow the ODC claimed by nearly 95,000 taxpayers on their 2020 returns because their dependents did not have TINs.<sup>6</sup>

1 For tax year 2021, the American Rescue Plan Act makes this credit fully refundable for certain taxpayers and increases the credit to \$3,000 for children under 18 and to \$3,600 for children under six. Pub. L. No. 117-2, § 9611, 135 Stat. 4, 359-376 (2021).

2 TCJA, Pub. L. 115-97, § 11022, 131 Stat. 2054, 2073 (2017), adding IRC § 24(h)(4) (applicable to taxable years beginning after Dec. 31, 2017, and before Jan. 1, 2026).

3 IRC § 24(h)(4).

4 IRC § 24(h)(4)(C).

5 See, e.g., IRS Form 1040 and 1040-SR Instructions 20 (2021); IRS Form 1040 and 1040-SR Instructions 18-19 (2021); 2021 Schedule 8812 (Form 1040) Instructions 2 (2021).

6 We presume the IRS exercised its summary assessment authority in reliance on IRC § 6213(g)(2)(I), which includes in the definition of “mathematical or clerical error” “an omission of a correct TIN required under section 24(e) (relating to child tax credit) to be included on a return.” Nearly 95,000 taxpayers were issued summary assessment notices, removing 93,734 dependents with respect to whom the ODC had been claimed because the dependents had invalid or missing TINs. (The nearly 95,000 taxpayers include both primary and secondary taxpayers on married filing joint returns and correspond to 63,580 tax returns.) IRS, Compliance Data Warehouse, Individual Returns Transaction File Form 1040 and Entity tables, TY 2020, returns posted by cycle 202234. If \$500 of ODC was claimed with respect to each dependent, then the total amount of disallowed ODC would be nearly \$47 million (i.e., 93,734 multiplied by \$500).

In response to an inquiry from TAS, the IRS Office of Chief Counsel explained its legal rationale as follows: “[I]n order to avoid treating dependents for whom a taxpayer may claim a credit under section 24(h)(4)(A) [*i.e.*, the ODC] inconsistently, section 24(e)(1) [which imposes a TIN requirement for claiming a “qualifying child” for a credit under section 24] should be interpreted as applying to all dependents for whom a taxpayer claims a credit under section 24(h)(4)(A), not only a qualifying child described in section 24(h)(4)(C) [*i.e.*, a “qualifying child” who lacks the SSN required by section 24(h)(7)].”<sup>7</sup>

It is a basic canon of statutory construction that the plain language of a statute controls, absent a clearly expressed legislative intent to the contrary.<sup>8</sup> Here, there is no statutory requirement that a dependent have a TIN to be claimed for the ODC. The IRS Office of Chief Counsel has imposed the requirement on its own, perhaps to deter fraudulent claims.

The TCJA legislative history suggests Congress considered a TIN requirement and did not adopt it. The House version of the TCJA included a requirement that a dependent have a TIN for purposes of the ODC, but the subsequent Senate version of the TCJA did not. The enacted bill followed the Senate approach.<sup>9</sup> It is possible that a drafting error was made, but if so, Congress – not the IRS – should correct it.<sup>10</sup>

To resolve the inconsistency between the absence of a TIN requirement in the ODC statute and the IRS’s decision to impose the requirement on its own, the National Taxpayer Advocate recommends that Congress clarify its intent.

## RECOMMENDATIONS

- Clarify whether a dependent with respect to whom a taxpayer claims the ODC under IRC § 24(h)(4) is required to have a TIN.
- If a dependent with respect to whom a taxpayer claims the ODC is required to have a TIN, clarify the type of taxpayer identification number required.

7 Email communication from the Office of Division Counsel/Associate Chief Counsel (National Taxpayer Advocate Program) to TAS Management & Program Analyst (Dec. 19, 2019) (on file with TAS). The email does not contain any references or citations to any legal authority for this position.

8 See, e.g., *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (“We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.”); *Connecticut Nat’l Bank v. Germain*, 503 U.S. 245, 254 (1992) (“[W]hen the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’”).

9 See H.R. REP. NO. 115-466, at 225-227 (2017), (CONF. REP.) <https://www.congress.gov/115/crpt/hrpt466/CRPT-115hrpt466.pdf>.

10 A technical correction was proposed, but the correction was not enacted into law. See Joint Committee on Taxation, JCX-1-19, *Technical Explanation of the House Ways and Means Committee Chairman’s Discussion Draft of the “Tax Technical and Clerical Corrections Act”* 5 (2019), <https://www.jct.gov/publications.html?func=startdown&id=5154>. The fact that Congress sought to make this a “technical correction” provides further evidence that the law does not require dependents to have TINs for purposes of the ODC.

**Legislative Recommendation #56****Allow Members of Certain Religious Sects That Do Not Participate in Social Security and Medicare to Obtain Employment Tax Refunds****SUMMARY**

- *Problem:* Members of certain religious sects, most notably the Amish, do not accept Social Security or Medicare benefits, and the law consequently exempts them from the requirement to pay Social Security and Medicare taxes if their employers are also members of recognized religious sects. However, the exemption does not apply if they work for employers who are *not* members of these religious sects. These conflicting outcomes burden affected individuals who work for non-sect employers, as they are required to pay Social Security and Medicare taxes for benefits they will neither claim nor receive.
- *Solution:* Allow members of recognized religious sects who work for employers that are not members of such sects to claim a refund or credit for employment taxes paid.

**PRESENT LAW**

IRC § 3101 imposes a tax on wages paid to employees to fund old-age, survivors, and disability insurance (Social Security) and hospital insurance (Medicare) pursuant to the Federal Insurance Contributions Act (FICA).<sup>1</sup> FICA tax is paid half by the employer and half by the employee.

IRC § 1401 imposes a comparable tax on self-employed individuals pursuant to the Self-Employment Contributions Act (SECA). SECA tax is paid in full by the self-employed individual.

Members of the Amish community sought exclusions from these taxes because the tenets of their religion prohibit them from accepting social insurance benefits. In response, Congress enacted IRC § 1402(g), which exempts self-employed individuals who are members of certain religious faiths from the requirement to pay SECA tax. An individual may apply for an exemption from SECA tax by filing IRS Form 4029, Application for Exemption From Social Security and Medicare Taxes and Waiver of Benefits,

... if he is a member of a recognized religious sect or division thereof and is an adherent of established tenets or teachings of such sect or division by reason of which he is conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement or makes payments toward the cost of, or provides services for, medical care (including the benefits of any insurance system established by the Social Security Act).

Congress subsequently enacted IRC § 3127 to exempt employers from paying their portion of FICA tax under IRC § 3111, provided that both the employer and the employee are members of a recognized religious sect, both the employer and the employee are adherents of established tenets or teachings of the sect, and both

<sup>1</sup> Under IRC § 3101, a tax of 6.2 percent is imposed on employee wages to fund old-age, survivors and disability insurance, and an additional tax of 1.45 percent is imposed to fund hospital insurance. In certain circumstances, employee wages are subject to an additional 0.9 percent tax to further fund hospital insurance (Additional Medicare Tax). Employers are generally required to withhold FICA taxes from their employees' wages under IRC § 3102(a).

the employer and employee file and receive approval for exemption from their respective portions of FICA tax.<sup>2</sup> The employer and employee each may receive approval by filing IRS Form 4029.<sup>3</sup>

IRC § 6413(b) requires the IRS to refund any overpayment of a taxpayer's FICA tax.

## REASONS FOR CHANGE

The exemptions under IRC §§ 1402(g) and 3127 do not extend to members of recognized religious sects who work for employers that are not members of the same or any religious sect. Members of these sects pay for Social Security and Medicare benefits that their religious beliefs prohibit them from accepting. The National Taxpayer Advocate believes this result is inequitable. The rationale for exempting self-employed Amish workers and Amish employees of Amish employers, as the law provides, applies equally to Amish employees who work for non-Amish employers.<sup>4</sup>

This inequity can be resolved by amending IRC § 6413 to allow employees who are members of a recognized religious group and work for an employer who is not a member of a recognized religious group to file a refund claim for their portion of remitted FICA tax. Amish leaders have expressed a preference for allowing Amish employees of non-Amish employers to recover the employee's portion of the FICA tax through a refund claim, rather than by exempting the employee from paying the FICA tax, to avoid imposing an additional recordkeeping burden on employers.<sup>5</sup>

## RECOMMENDATION

- Amend IRC § 6413 to allow employees who meet the definition of “a member of a recognized religious sect or division thereof” in IRC § 1402(g) to claim a credit or refund of the employee's portion of FICA taxes withheld from their wages.<sup>6</sup>

2 IRC § 3127 establishes the requirements for employers and employees who are members and adherents of a recognized religious sect to be exempt from their respective FICA tax obligations as required under IRC §§ 3101 and 3111. If the employer is a partnership, all partners of that partnership must be members of and adhere to the tenets of a recognized religious sect. All partners of the partnership must apply and be approved individually for the exemption. Treas. Reg. § 31.3127-1(a).

3 For more information regarding the Form 4029 exemption application for members of recognized religious sects, see IRS Publication 517, Social Security and Other Information for Members of the Clergy and Religious Workers (Mar. 2022).

4 IRC § 1402(g). The discussion in this legislative recommendation applies to any member of a recognized religious sect or division thereof as described in IRC § 1402(g). Historically, the Amish and the Mennonites have been the religious groups that have utilized this provision.

5 Meeting between TAS and Amish leaders (Aug. 16, 2019). If this recommendation is enacted, an employer who is not a qualifying member of a recognized religious sect would remain liable for his or her portion of the FICA tax pursuant to IRC § 3111.

6 For legislative language generally consistent with this recommendation, see Religious Exemptions for Social Security and Healthcare Taxes Act, H.R. 6183, 117th Cong. (2021).



**Legislative Recommendation #57****Amend the Lookback Period for Allowing Tax Credits or Refunds to Include the Period of Any Postponement or Additional or Disregarded Time for Timely Filing a Tax Return****SUMMARY**

- *Problem:* Taxpayers who file their tax returns by the April 15 filing deadline ordinarily have until April 15 three years later to file a refund claim and receive a credit or refund of any overpayments of tax. In 2020 and 2021, the IRS postponed the April 15 filing deadline due to the COVID-19 pandemic, but the three-year deadline for the IRS to allow a credit or refund was not extended. Consequently, some taxpayers who took advantage of the postponed filing deadline and file refund claims within three years from the date they filed their returns will have their refund claims rejected as untimely.
- *Solution:* When the IRS postpones a filing deadline, extend the three-year period within which claims for refund or credit are allowed by the same amount of time.

**PRESENT LAW**

IRC § 6511(a) provides that taxpayers who believe they have overpaid their taxes may file a claim for credit or refund with the IRS by the later of:

1. Three years from the date the return was filed, or
2. Two years from the date the tax was paid.

IRC § 6511(b) places limits on the amount the IRS may credit or refund by using a two- or three-year lookback period:

1. Taxpayers who file claims for credit or refund within three years from the date the original return was filed will have their credits or refunds limited to the amounts paid within the three-year period before the filing of the claim *plus the period of any extension of time for filing the original return* (the “three-year lookback period”). See IRC § 6511(b)(2)(A).
2. Taxpayers who do not file claims for credit or refund within three years from the date the original return was filed will have their credits or refunds limited to the amounts paid within the two-year period before filing the claim. See IRC § 6511(b)(2)(B).

For calendar year taxpayers, IRC § 6513(b) provides that any tax deducted and withheld on wages and any amounts paid as estimated tax are deemed to have been paid on April 15 in the year following the close of the taxable year to which the tax is allowable as a credit.

Under IRC § 7508A, when the Secretary determines that a taxpayer has been affected by a federally declared disaster, the Secretary is authorized to “disregard” for up to one year certain acts a taxpayer is required to undertake under the IRC, including the filing of a tax return.<sup>1</sup> The time which is disregarded in this context has been described as a “postponement.”<sup>2</sup> For example, the Secretary exercised this authority to address the

<sup>1</sup> IRC § 7508A also authorizes the Secretary to disregard certain IRS acts for a period of up to one year.

<sup>2</sup> See Treas. Reg. § 301.7508A-1(d)(3).

COVID-19 pandemic by disregarding the period from April 15 to July 15 in 2020 and by disregarding the period from April 15 to May 17 in 2021 for purposes of timely filing an individual income tax return.<sup>3</sup>

## REASONS FOR CHANGE

In determining the lookback period for the allowance of tax credits or refunds, there is a legally significant distinction between an *extension* of the filing deadline and other provisions which may *disregard* time for purposes of determining whether a filing is timely. When a taxpayer files a Form 4868, Application for Automatic Extension of Time to File U.S. Individual Income Tax Return, IRC § 6511(b)(2)(A) extends the three-year lookback for the period of the extension (generally six months). When a filing deadline is postponed under IRC § 7508A, however, the three-year lookback period on amounts paid is not extended to include payments made more than three years earlier than the postponed filing date.

*Example:* In 2019, a taxpayer had income tax withheld from his paycheck every two weeks. In 2020, the taxpayer filed his 2019 return on the *postponed* filing deadline of July 15. The taxpayer's 2019 tax liability was fully paid through withholding, which was deemed paid on April 15, 2020, the due date of the return. Based upon the filing deadline postponement to July 15, the taxpayer files a claim for refund on July 14, 2023. Under IRC § 6511(a), the claim for refund is timely, as it was filed within three years from the filing date of the original return. Under the three-year lookback period of IRC § 6511(b), however, the amount of the taxpayer's refund is limited to payments made in the three years prior to filing the claim (*i.e.*, payments made on or after July 15, 2020). The withholding deemed paid on April 15, 2020, falls outside that period (as would any estimated tax payments), so the refund amount will be limited to \$0, effectively denying the taxpayer any refund.

By contrast, if the taxpayer had requested a filing *extension* until October 15, 2020, the taxpayer would have had until October 16, 2023, (October 15, 2023, is a Sunday<sup>4</sup>) to be eligible to receive a refund.

We do not believe the outcome in the above example was intended. More likely, it is an unanticipated result of the interaction between the rules governing the filing of a claim for credit or refund and the rules limiting the amount of a credit or refund that may be allowed. The date for filing a claim for credit or refund and the lookback period generally align for taxpayers who file timely, but they do not align in these circumstances. Because of the large number of taxpayers who relied on the *postponed* filing deadlines in 2020 and 2021, the National Taxpayer Advocate recommends that Congress act quickly to authorize the IRS to pay refunds with respect to amounts paid within the preceding three-year period plus the period of any postponement or additional or disregarded time for timely filing, such as additional time to file pursuant to IRC § 7503 and time disregarded pursuant to IRC §§ 7508 and 7508A, before these claims for credit or refund are filed. Although this problem has become apparent because of the COVID-19 pandemic, it has the potential to arise any time the IRS exercises its authority under IRC § 7508A to postpone the filing deadline. The proposed recommendation would prevent this problem from recurring in the future in addition to addressing the immediate concern.

3 See Notice 2020-23, 2020-18 I.R.B. 742; Notice 2021-21, 2021-15 I.R.B. 986. These notices did not affect the date on which any withheld tax or estimated tax for 2019 or 2020 is deemed paid. Any withheld tax or estimated tax for 2019 is deemed paid on April 15, 2020, for calendar year taxpayers. Similarly, any withheld or estimated tax for 2020 is deemed paid on April 15, 2021, for calendar year taxpayers.

4 See IRC § 7503 (when last day for filing falls on a Saturday, Sunday, or legal holiday, the act will be timely if performed on the next business day). See also Rev. Rul. 2003-41, 2003-1 C.B. 814 (concluding that when a return is filed on the first business day after a weekend or legal holiday, the lookback period is adjusted accordingly).

**RECOMMENDATION**

- Amend IRC § 6511(b)(2)(A) to provide that when any postponement or addition or disregarding of time is granted pursuant to the IRC for purposes of timely filing, the limit on the amount of a credit or refund will be the amounts paid in the three-year period preceding the filing of a claim for credit or refund plus the period of any extension, postponement, or additional or disregarded time for timely filing the related return.

**Legislative Recommendation #58****Modify the Requirement That Written Receipts Acknowledging Charitable Contributions Must Pre-Date the Filing of a Tax Return****SUMMARY**

- *Problem:* To claim a charitable contribution, a taxpayer must obtain a contemporaneous written acknowledgment (CWA) that states the amount of cash and a description of any property contributed, whether any goods or services were received in exchange, and a description and estimate of the value of any such goods or services. The CWA must be received prior to the date of filing the return or the due date of the return, whichever is earlier. This is a strict requirement with no exceptions. If taxpayers do not obtain a CWA prior to the filing date or due date, they are not eligible for the deduction, even if they made the contribution and can otherwise substantiate it.
- *Solution:* Eliminate the “contemporaneous written acknowledgment” requirement and replace it with an “adequate written documentation” requirement.

**PRESENT LAW**

IRC § 170(a) authorizes deductions for charitable contributions made in a taxable year. IRC § 170(f)(8) disallows charitable contribution deductions over \$250 unless the taxpayer substantiates the contributions with a CWA of the contribution from the donee organization. The CWA must be received before the earlier of the date on which the tax return is filed or the date on which the tax return is due.<sup>1</sup> The acknowledgment must include the following:

- (i) The amount of cash and a description (but not value) of any property other than cash contributed.
- (ii) Whether the donee organization provided any goods or services in consideration, in whole or in part, for any property described in clause (i).
- (iii) A description and good-faith estimate of the value of any goods or services referred to in clause (ii) or, if such goods or services consist solely of intangible religious benefits, a statement to that effect.

The CWA does not need to take any particular form, but the requirement for the content and timing is strict.<sup>2</sup> For purposes of the CWA, substantially complying with the rules is not enough. The law is rigid and does not permit the IRS or judges to exercise discretion.<sup>3</sup>

**REASONS FOR CHANGE**

The strict CWA requirement of IRC § 170(f)(8) harms taxpayers and tax-exempt organizations that are trying to do the right thing but may not be aware of the exact legal requirements.

*Example:* Assume a taxpayer contributes \$1,000 to a school’s Parent Teacher Association (PTA). She receives a receipt at the time of donation showing the amount given. At the time she files her return, she has not received a letter from the PTA acknowledging the \$1,000 donation and stating that no goods or services were provided in consideration for the \$1,000 donation. She files her tax return claiming

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<sup>1</sup> IRC § 170(f)(8)(C).

<sup>2</sup> See *Albrecht v. Commissioner*, T.C. Memo. 2022-53. This is a case where the Tax Court denied taxpayer’s claimed charitable contributions solely because the written acknowledgment was not contemporaneous. The taxpayer’s good faith attempt to substantially comply with the Internal Revenue Code by executing a deed with the donee organization for contribution of property did not satisfy the strict contemporaneous written acknowledgment requirement.

<sup>3</sup> 15 W. 17th St. LLC v. *Commissioner*, 147 T.C. 557 (2016).

a charitable contribution deduction, unaware of the CWA rule. Even if she has a copy of a canceled check or credit card statement and even if she receives an acknowledgment from the PTA the day after she files her return confirming the contribution and provides this documentation to the IRS, she will be ineligible for the charitable deduction. If she were to contest this outcome in the Tax Court, the judge would not have the discretion to allow the deduction, even if the evidence conclusively showed the contribution was made and no goods or services were provided in exchange.

This is a trap for the unwary and has the potential to affect a large number of taxpayers. For tax year 2020, 11,785,575 individual income tax returns claimed charitable contributions over \$250.<sup>4</sup> Of that total, 10,394,676 reported cash donations.<sup>5</sup>

In other contexts, Congress has acknowledged that the “contemporaneous” recordkeeping requirement is overly burdensome on taxpayers. In 1984, Congress added a contemporaneous recordkeeping requirement to IRC § 274 (requiring contemporaneous substantiation of entertainment expenses) due to concern about significant overstatements of deductions. Yet by 1985, it concluded the contemporaneous recordkeeping requirement “sweeps too broadly and generally imposes excessive recordkeeping burdens on many taxpayers.”<sup>6</sup> Congress repealed the “contemporaneous” requirement and replaced it with an “adequate documentation” standard.<sup>7</sup> Nowhere else in the IRC (the Code) is the term “contemporaneous” used with such a strict effect. Other references in the Code use “reasonably contemporaneous” or “substantially contemporaneous,” providing a more flexible approach for those administering the Code to get to the right result.<sup>8</sup>

Removing the “contemporaneous written acknowledgment” requirement and replacing it with an “adequate written documentation” requirement would still require taxpayers to provide proof to substantiate their deductions, but it would reduce taxpayer burden and give the IRS common sense flexibility in administering the law. Notably, it would leave intact the provisions requiring reporting on whether any goods or services were provided in exchange for the donation. This would address Congress’s core concern, as described in the legislative history, about *quid pro quo* contributions.<sup>9</sup>

## RECOMMENDATIONS

- Remove the words “contemporaneous written acknowledgment” from IRC § 170(f)(8), 170(f)(12), and 170(f)(18) and replace them with “adequate written documentation.”<sup>10</sup>
- Remove IRC § 170(f)(8)(C).

4 IRS, Individual Return Transaction File, IRS Compliance Data Warehouse (Sept. 8, 2022).

5 *Id.*

6 H.R. REP. NO. 99-23 (Apr. 2, 1985); H.R. REP. NO. 99-34 (Apr. 2, 1985).

7 IRC § 274(d) requires substantiation “by adequate records or by sufficient evidence corroborating the taxpayer’s own statement...”

8 See IRC §§ 1258, 1260, and 4975.

9 H.R. REP. NO. 103-213, at 563-564 (Aug. 4, 1993).

10 Conforming changes may be required in IRC §§ 2522 and 6720.

**Legislative Recommendation #59****Make Standard Mileage Rates Consistent****SUMMARY**

- *Problem:* The IRC authorizes taxpayers to deduct the costs of operating an automobile for several purposes. In combination with administrative guidance, however, it authorizes different standard mileage rates for each purpose. This is illogical and confusing to taxpayers, tax professionals, and IRS employees alike.
- *Solution:* Provide a single mileage deduction rate for all purposes.

**PRESENT LAW**

There are currently three different standard mileage rates: one for business miles, one for charitable miles, and a third for medical transportation and military relocation miles. The rate for charitable miles is fixed in the IRC. The mileage rates for other purposes are not fixed by the IRC. Instead, the IRS adjusts the mileage rates annually.<sup>1</sup> Revenue Procedure 2019-46 states that the IRS will adjust the mileage rates in an annual notice.

- *Business Miles:* IRC § 162 authorizes a deduction for the ordinary and necessary expenses a taxpayer pays or incurs during the taxable year, including the costs of operating an automobile used in the business. The mileage deduction for business purposes is currently 62.5 cents per mile.<sup>2</sup>
- *Charitable Miles:* IRC § 170 authorizes a deduction for the use of an automobile in providing free services to a charitable organization. IRC § 170(i) sets the mileage deduction for providing free services to a charitable organization at 14 cents per mile. This amount was set in 1998, was not indexed for inflation, and has not been changed since that time.<sup>3</sup>
- *Medical and Military Moving Miles:* Deductions for the costs of operating an automobile are currently permitted for transport to medical care (see IRC § 213) and for military moving purposes (see IRC § 217). The standard mileage rate for these purposes is currently 22 cents per mile.<sup>4</sup>

The IRS sets the standard mileage rate for business purposes by adding the fixed and variable costs of operating a motor vehicle. It sets the standard mileage rate for medical transportation and military relocation automobile expenses based solely on variable costs.<sup>5</sup> Taxpayers have the option to calculate the actual costs of operating a vehicle in lieu of claiming the standard mileage allowance.<sup>6</sup>

**REASONS FOR CHANGE**

The IRC provides or authorizes different mileage rates for different purposes. The costs of operating a motor vehicle are the same regardless of whether the vehicle is used for business, charitable, medical, or military moving purposes. The use of different rates makes little sense and causes confusion for taxpayers, tax professionals, and IRS employees. For example, someone may know the deduction rate for one purpose and,

1 See IRC § 62; Treas. Reg. §§ 1.62-2 and 1.274-5.

2 IRS, Standard Mileage Rates, <https://www.irs.gov/tax-professionals/standard-mileage-rates> (last visited Sept. 20, 2022); IRS, IRS Increases Mileage rate for remainder of 2022, (June 9, 2022), <https://www.irs.gov/newsroom/irs-increases-mileage-rate-for-remainder-of-2022>.

3 IRC § 170(i), Pub. L. 105-34, (Aug. 4, 1997).

4 IRS, Standard Mileage Rates, <https://www.irs.gov/tax-professionals/standard-mileage-rates> (last visited Sept. 20, 2022); IRS, IRS Increases Mileage rate for remainder of 2022, (June 9, 2022), <https://www.irs.gov/newsroom/irs-increases-mileage-rate-for-remainder-of-2022>.

5 IRS News Release, IR 2021-251, IRS issues standard mileage rates for 2022 (Dec. 17, 2021), <https://www.irs.gov/newsroom/irs-issues-standard-mileage-rates-for-2022>.

6 *Id.*

not realizing there are different rates, erroneously apply that rate for another purpose. Indeed, some civic minded self-employed individuals may claim mileage deductions for both business and charitable purposes on the same tax return. Apart from the obvious confusion that may cause, an incentive will arise to allocate more miles for business purposes (62.5 cents per mile) and fewer miles for charitable purposes (14 cents per mile). Not only do multiple rates cause confusion, but if a taxpayer uses the wrong rate, even inadvertently, he or she may be subject to a tax adjustment, penalties, and interest charges. This undermines public confidence in the fairness of the tax system. If a motor vehicle on average costs a certain amount to operate, that mileage rate should apply across the board.

Additionally, the National Taxpayer Advocate notes that the 14-cent standard mileage rate for charitable miles established in 1998 does not reflect the current costs of automobile usage. Mileage rates should be indexed for inflation.

## RECOMMENDATIONS

- Implement consistent standard mileage rates for business, charitable, medical, and military moving expenses, harmonizing IRC §§ 162, 170(i), 213, and 217.
- Index the standard mileage rate for inflation.



**Legislative Recommendation #60****Eliminate the Marriage Penalty for Nonresident Aliens Who Otherwise Qualify for the Premium Tax Credit****SUMMARY**

- *Problem:* Nonresident aliens who are lawfully present in the United States are eligible to receive the Premium Tax Credit (PTC) to subsidize the cost of health insurance. Due to a possible glitch in drafting the law, however, a lawfully present nonresident alien who is married to another nonresident alien is barred from receiving the PTC. This creates a “marriage penalty.”
- *Solution:* Revise the PTC eligibility requirements to remove the marriage penalty for nonresident aliens who are lawfully present in the United States.

**PRESENT LAW**

To be eligible to enroll in health coverage through the Health Insurance Marketplace (Marketplace), an individual must live in the United States; be a U.S. citizen, a U.S. national, or a lawfully present person;<sup>1</sup> and not be incarcerated.<sup>2</sup> Immigrants and non-immigrants lawfully present in the United States and covered under the Compact of Free Association Approval Act (Pub. L. No. 99-658) can enroll in health insurance through the Health Insurance Marketplace.<sup>3</sup>

IRC § 36B authorizes the PTC, a refundable credit that subsidizes the cost of eligible individuals’ and families’ premiums for health insurance purchased through the Marketplace. Eligibility for the PTC depends on several factors, including household income level based on family size; eligibility for affordable coverage through an eligible employer-sponsored plan that provides minimum value; eligibility to enroll in government-provided health coverage like Medicare, Medicaid, or TRICARE; and whether the individual can be claimed as a dependent by another person.

Eligible taxpayers may also choose to have advance payments of the PTC (APTC) made on their behalf for the year of coverage. APTC is paid directly to the insurer that the taxpayer selected from the Marketplace to help defray the taxpayer’s insurance premiums during that year. The amount of APTC for which a taxpayer is eligible is based on an estimate of the taxpayer’s PTC for the year of coverage. Taxpayers who choose to have APTC paid on their behalf must reconcile the APTC with the PTC they are allowed for the year of coverage when filing a tax return for the year. If a taxpayer’s APTC for the year is more than the taxpayer’s allowed PTC, the taxpayer must repay all or a portion of the difference by increasing their tax liability for the year of coverage.

IRC § 36B(c)(1)(C) provides that if a taxpayer is married at the close of the taxable year, the taxpayer may not claim the PTC unless the taxpayer and the taxpayer’s spouse file a joint return for the taxable year.<sup>4</sup>

1 IRC § 36B(e)(2). The term “lawfully present” refers to aliens who have: “qualified non-citizen” immigration status without a waiting period; humanitarian statuses or circumstances (including temporary protected status, special juvenile status, asylum applicants, and victims of trafficking); valid non-immigrant visas; and legal status conferred by other laws (e.g., Immigration Reform and Immigrant Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359; Legal Immigration and Family Equity Act, Pub. L. 106-553, 114 Stat. 2762 (2000)). See Treas. Reg. § 1.36B-1(g); 45 C.F.R. § 152.2. 45 C.F.R. § 152.2(8) excludes individuals with deferred action under the Department of Homeland Security’s deferred action for childhood arrivals process from the definition of “lawfully present” as defined in 45 C.F.R. § 152.2(1)–(7).

2 42 USC § 18032(f).

3 Immigrants and nonimmigrants with the following statuses can purchase insurance through the Marketplace: Worker visas (e.g., H1, H-2A, H-2B); Student visas; U-visas; T-visas; and Citizens of Micronesia, the Marshall Islands, and Palau.

4 Exceptions apply for victims of domestic abuse and spousal abandonment. See Treas. Reg. § 1.36B-2(b)(2)(ii); IRC § 7703(b).

IRC § 6013(a)(1) prohibits married taxpayers from filing a joint return “if either the husband or wife at any time during the taxable year is a nonresident alien.” Under IRC § 6013(g), a nonresident alien who is married to a U.S. citizen or resident can choose to be treated as a resident, and IRC § 6015(h) allows the spouses to file a joint return on Form 1040 or Form 1040-SR in this circumstance. If both spouses are nonresident aliens, however, they are barred from filing a joint return and therefore barred from eligibility for the PTC.

## REASONS FOR CHANGE

The interaction of the above rules leads to an anomalous result that probably was not intended. Nonresident aliens who are lawfully present in the United States may be eligible for the PTC health insurance subsidy if they are not married, but if they are married to another nonresident alien, they are barred from receiving the PTC – a severe and unwarranted “marriage penalty.”<sup>5</sup>

## RECOMMENDATION

- Amend IRC § 36B(c)(1)(C) to eliminate the joint filing requirement for a nonresident alien who is married to another nonresident alien at the end of the taxable year.

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<sup>5</sup> Moreover, if a nonresident alien required to file Form 1040-NR with a status of married filing separately receives the benefit of the APTC, that individual will be required to repay some or all of the APTC.

**Legislative Recommendation #61****Encourage and Authorize Independent Contractors and Service Recipients to Enter Into Voluntary Withholding Agreements****SUMMARY**

- *Problem:* Independent contractors are not subject to wage withholding. Instead, they are required to pay their taxes on their own. Many do not. Their failure to pay reduces federal revenue collection, and effectively requires the majority of taxpayers who pay their taxes to subsidize them. It also makes them liable for unpaid tax as well as penalties and interest charges if the IRS audits them or otherwise detects their noncompliance.
- *Solution:* Encourage independent contractors and businesses to enter into withholding agreements.

**PRESENT LAW**

IRC Chapter 24, Collection of Income Tax at Source on Wages, provides for required withholding of taxes on wages paid to employees, certain gambling winnings, certain pensions and annuities, amounts subject to backup withholding, and certain other payments. In addition, IRC § 3402(p) provides for voluntary withholding at the option of the income recipient on certain payments such as Social Security benefits, unemployment benefits, and certain other benefits.<sup>1</sup> IRC § 3402(p)(3) authorizes the Secretary to promulgate regulations to provide for withholding from any payment that does not constitute wages if the Secretary finds withholding would be appropriate and the payor and recipient of the payment agree to such withholding.<sup>2</sup>

Although the Secretary may issue guidance by publication in the Internal Revenue Bulletin describing payments for which withholding under a voluntary withholding agreement would be appropriate,<sup>3</sup> the only such guidance issued to date is Notice 2013-77, dealing with dividends and other distributions by Alaska Native Corporations.<sup>4</sup>

IRC § 6654(a) generally imposes a penalty for failure to pay sufficient estimated tax during the year, computed by applying (i) the underpayment rate established under IRC § 6621, (ii) to the underpayment, (iii) for the period of the underpayment.

**REASONS FOR CHANGE**

Unlike employees, whose wage payments are subject to federal income tax withholding, independent contractors are generally responsible for paying their own income taxes. Independent contractors generally must make four estimated tax payments during the year. However, many contractors fail to make estimated tax payments for a variety of reasons and therefore face penalties under IRC § 6654. In addition, some do not save enough funds to pay their taxes at the end of the year. As a result, they face additional penalties and interest charges, and they may face IRS collection action, including liens and levies.

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1 IRC § 3402(p)(1)(C), (p)(2).

2 IRC § 3402(p)(3) authorizes the promulgation of regulations for withholding from (i) an employee's remuneration for services that do not constitute wages and (ii) any other agreed-upon source that the Secretary finds appropriate. The Secretary must find the withholding would be appropriate "under the provisions of [IRC chapter 24, Collection of Income Tax at Source on Wages]." Payments made when a voluntary withholding agreement is in effect are treated as if they are wages paid by an employer to an employee for purposes of the income tax withholding provisions and related procedural provisions of subtitle F of the IRC.

3 See Treas. Reg. § 31.3402(p)-1(c).

4 IRS Notice 2013-77, 2013-50 I.R.B. 632.

The absence of withholding on payments to independent contractors also has a negative impact on revenue collection. IRS National Research Program studies show that tax compliance is substantially lower among workers whose income taxes are not withheld.<sup>5</sup>

This problem may be increasing as more workers are working in the so-called “gig economy.” As of 2022, there were over 57 million U.S. workers participating in the gig economy.<sup>6</sup> To reduce the risk they will not save enough money to pay their taxes, some independent contractors would prefer that taxes be withheld throughout the year, as they are for employees. There is a legitimate debate about the circumstances under which withholding should be required. However, the National Taxpayer Advocate believes the law should not discourage workers and businesses from entering into voluntary withholding agreements when both parties wish to do so.

For many businesses, withholding on payments to independent contractors will not impose an additional burden. In addition to paying independent contractors, most large companies have full-time employees, such as administrative staff, so they already have procedures in place to withhold. We understand businesses are reluctant to withhold due to concerns that the IRS may cite the existence of withholding agreements to challenge underlying worker classification arrangements. These concerns could be addressed if the IRS is restricted from citing the existence of a voluntary withholding agreement as a factor in worker classification disputes. Indeed, the IRS could, on a case-by-case basis, provide a safe-harbor worker classification in which it affirmatively agrees not to challenge the classification of workers who are party to such agreements, since these agreements will help ensure the IRS collects taxes.

## RECOMMENDATIONS

- Amend IRC § 3402(p) to clarify that when voluntary withholding agreements are entered into by parties who do not treat themselves as engaged in an employer-employee relationship, the IRS may not consider the existence of such agreements as a factor when challenging worker classification arrangements.
- Direct the Secretary to evaluate the benefits of agreeing not to challenge worker classification arrangements when voluntary withholding agreements are in place.<sup>7</sup>

<sup>5</sup> IRS, Publication 1415, Research Analysis and Applied Statistics Federal Tax Compliance Research: Tax Gap Estimates for Tax Years 2014-2016 (Rev. Aug 2022).

<sup>6</sup> *Gig Economy in the U.S. – Statistics & Facts*, STATISTA (Sept. 30, 2022), <https://www.statista.com/topics/4891/gig-economy-in-the-us/>.

<sup>7</sup> For legislative language generally consistent with this recommendation, see Small Business Owners' Tax Simplification Act of 2017, H.R. 3717, 115th Cong. § 9 (2017).

**Legislative Recommendation #62****Require the IRS to Specify the Information Needed in Third-Party Contact Notices****SUMMARY**

- *Problem:* The IRS may contact third parties to obtain information or documentation relating to taxpayers. Recognizing that third-party contacts “may have a chilling effect on the taxpayer’s business and could damage the taxpayer’s reputation in the community,” Congress has required the IRS to provide advance notice to affected taxpayers. However, the IRS sometimes does not tell the taxpayer what information it is seeking or give the taxpayer a reasonable opportunity to provide the information so that a third-party contact can be avoided.
- *Solution:* Require the IRS to provide taxpayers with a tailored notice that identifies the specific information it plans to request from a third party. Before the IRS seeks such information from a third party, taxpayers should be given a reasonable period of time to respond to the notice, including by providing the required information, unless an exception under IRC § 7602(c)(3) applies.<sup>1</sup>

**PRESENT LAW**

IRC § 7602(c)(1) generally requires the IRS to give taxpayers notice before contacting third parties (*e.g.*, banks, employers, employees, vendors, customers, friends, and neighbors) to request information about them. The IRS may provide this third-party contact (TPC) notice only if it intends to make a TPC during the period specified in the notice, which may not exceed one year. Generally, the IRS must send the notice at least 45 days before making the TPC.

IRC § 7602(c)(3) waives the TPC notice requirement if (i) the taxpayer has authorized the contact; (ii) the IRS determines for good cause that notice would jeopardize the IRS’s tax collection efforts or may involve reprisal against any person; or (iii) the contact is made in connection with a criminal investigation. No law expressly requires the IRS to let the taxpayer know what specific information it needs (or needs to verify) before contacting third parties.

**REASONS FOR CHANGE**

The TPC notice requirement was enacted as part of the IRS Restructuring and Reform Act of 1998 (RRA 98). The Senate report accompanying the bill explained that “taxpayers should have the opportunity to resolve issues and volunteer information before the IRS contacts third parties.”<sup>2</sup> The House-Senate conference report accompanying RRA 98 stated that “in general” the TPC notice “will be provided as part of an existing IRS notice.”<sup>3</sup> Based on the conference report, the IRS implemented the TPC notice requirement by including generic language in Publication 1, *Your Rights as a Taxpayer*, which the IRS sends to taxpayers in a variety of circumstances whether or not it plans to make a TPC.<sup>4</sup>

1 IRC § 7602(c)(3) provides: “This subsection shall not apply— (A) to any contact which the taxpayer has authorized; (B) if the Secretary determines for good cause shown that such notice would jeopardize collection of any tax, or such notice may involve reprisal against any person; or (C) with respect to any pending criminal investigation.”

2 S. REP. NO. 105-174, at 77 (1998).

3 H.R. REP. NO. 105-599, at 277 (1998) (CONF. REP.).

4 IRS Pub. 1, *Your Rights as a Taxpayer* (Sept. 2017). Under the heading “Potential Third Party Contacts,” Pub. 1 states, in part: “[W]e sometimes talk with other persons if we need information that you have been unable to provide or to verify information we have received.”

When Congress enacted the Taxpayer First Act (TFA), it rejected the generic approach of including the TPC language in Publication 1. The TFA amended IRC § 7602(c) to require the IRS to send the TPC notice only when it intends to make a TPC and to send the TPC notice at least 45 days before making the contact.<sup>5</sup> In explaining the change, the House report accompanying the TFA quoted testimony from a former IRS official who said the then-existing TPC notice requirement was “useless and does not effectively apprise taxpayers that such contact will be made, to whom it will be made, or that the taxpayer can request a third party contact report from the IRS.”<sup>6</sup> The House report said TPCs “may have a chilling effect on the taxpayer’s business and could damage the taxpayer’s reputation in the community.” It also said the change would “provide taxpayers more of an opportunity to resolve issues and volunteer information before the IRS contacts third parties.” If the TPC notices were included “as part of an existing IRS notice” such as Form 4564, Information Document Request, which requests information from the taxpayer, then the new 45-day period would give the taxpayer a realistic opportunity to avoid a TPC that seeks new information by providing the information requested on the form. However, the IRS generally does not include a request for that information with the TPC notice.<sup>7</sup>

A tailored notice that identifies the specific information the IRS plans to request from a third party would be more effective than a generic notice in motivating taxpayers to provide the information themselves. The IRS has previously tailored TPC notices in this way.<sup>8</sup> Generating tailored notices would not unduly burden the IRS because most IRS third-party contacts occur in the collection context, where the IRS is seeking assets rather than information.<sup>9</sup> In the subset of cases where the IRS is seeking specific information, identifying what information the IRS is seeking would empower the taxpayer to protect his or her reputation by providing the information so that the TPC is unnecessary. Thus, using tailored TPC notices is consistent with a taxpayer’s *right to be informed* and *right to privacy*, which includes the right to expect enforcement to be no more intrusive than necessary,<sup>10</sup> and it might reduce the need for the IRS to spend resources needed to make the TPCs as well.

## RECOMMENDATION

- Amend IRC § 7602(c) to require the IRS to provide taxpayers with a tailored notice that identifies the specific information it plans to request from a third party. Before the IRS seeks such information from a third party, taxpayers should be given a reasonable period of time to respond to the notice, including by providing the required information, unless an exception under IRC § 7602(c)(3) applies.<sup>11</sup>

5 Pub. L. No. 116-25, § 1206, 133 Stat. 981, 990 (2019).

6 H.R. REP. NO. 116-39, pt. 1, at 44-45 (2019). This report accompanied H.R. 1957, 116th Cong. (2019). Congress ultimately made one change to H.R. 1957 unrelated to the TPC provision and enacted the TFA as H.R. 3151, 116th Cong. (2019). However, H.R. REP. NO. 116-39 remains the sole committee report explaining the TFA.

7 See, e.g., IRS, New Third Party Contact Requirements, SBSE-05-0520-0639 (May 26, 2020); Letters 3164, Notification of Third Party Contact.

8 For further discussion, see National Taxpayer Advocate 2015 Annual Report to Congress 123, 127 (Most Serious Problem: *Third Party Contacts: IRS Third Party Contact Procedures Do Not Follow the Law and May Unnecessarily Damage Taxpayers’ Businesses and Reputations*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC15\\_Volume1\\_MSP\\_12\\_Third-Party-Contacts.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC15_Volume1_MSP_12_Third-Party-Contacts.pdf); National Taxpayer Advocate 2018 Objectives Report to Congress 98-101 (Area of Focus: *IRS Third Party Contact (TPC) Notices Should Be More Specific, Actionable, and Effective*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/JRC18\\_Volume1\\_AOF\\_12.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/JRC18_Volume1_AOF_12.pdf).

9 Third-party contacts often arise from IRS requests for payment from third parties, such as banks served with a levy for the taxpayer’s funds on deposit or in connection with the advertising or conduct of public auction sales of the taxpayer’s property. A prior TAS study found that the IRS made TPCs in 68.1 percent of its field collection cases and 8.5 percent of its field examination cases. National Taxpayer Advocate 2015 Annual Report to Congress 123 (Most Serious Problem: *Third Party Contacts: IRS Third Party Contact Procedures Do Not Follow the Law and May Unnecessarily Damage Taxpayers’ Businesses and Reputations*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC15\\_Volume1\\_MSP\\_12\\_Third-Party-Contacts.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC15_Volume1_MSP_12_Third-Party-Contacts.pdf). This proposal generally does not cover collection contacts, because in those cases, the IRS is not asking a third party for information that the taxpayer could provide.

10 IRS, Pub. 1, Your Rights as a Taxpayer (Sept. 2017).

11 If the taxpayer responds, the IRS may still contact a third party if it has a legitimate need to interview witnesses or corroborate information provided by the taxpayer.



**Legislative Recommendation #63****Expand the Protection of Taxpayer Rights by Strengthening the Low Income Taxpayer Clinic Program****SUMMARY**

- *Problem:* In 1998, Congress created the Low Income Taxpayer Clinic (LITC) grant program to provide free or nominal-cost representation to low-income taxpayers involved in controversies with the IRS and to provide education about taxpayer rights and responsibilities to taxpayers who speak English as a second language (ESL taxpayers). The law capped the grant that could be awarded to any clinic at \$100,000 per year. That amount was not indexed for inflation and has never been raised. As a result of this limitation and certain others, the LITC program is not as effective as it could be in assisting the maximum number of eligible low-income taxpayers.
- *Solution:* Eliminate the \$100,000 per-clinic funding cap and make certain other changes described below to better assist qualifying taxpayers.

**PRESENT LAW**

IRC § 7526 authorizes the Secretary, subject to the availability of appropriated funds, to provide matching grants for the development, expansion, or continuation of LITCs. The LITC Program was authorized as part of the IRS Restructuring and Reform Act of 1998 to provide free or nominal-cost representation to low-income taxpayers who are involved in controversies with the IRS and education about taxpayer rights and responsibilities in multiple languages for ESL taxpayers.

IRC § 7526(c)(1) imposes an annual aggregate limitation of \$6 million for LITC grants “[u]nless otherwise provided by specific appropriation.”

IRC § 7526(c)(2) imposes an annual limitation on grants to a single clinic of \$100,000.

IRC § 7526(c)(5) limits the amount of LITC funding a clinic may receive to the amount it raises from other sources (*i.e.*, a 100 percent matching funds requirement). The match may be in cash or third party in-kind contributions (*e.g.*, volunteer time, donated supplies).

**REASONS FOR CHANGE**

The LITC Program is an effective and low-cost means to assist low-income and ESL taxpayers. In 2022, the LITC Program Office awarded grants to 130 organizations in 46 states and the District of Columbia. In 2021, the most recent year for which complete data is available, clinics receiving grant funds represented over 20,000 taxpayers dealing with an IRS tax controversy, including in cases before the U.S. Tax Court. They provided consultations or advice to over 15,000 additional taxpayers. The clinics worked closely with the Tax Court and the IRS Office of Chief Counsel to resolve docketed cases on a pre-trial basis where possible. They helped taxpayers secure more than \$6.7 million in tax refunds and reduced or corrected taxpayers’ liabilities by more than \$62 million. They also brought thousands of taxpayers back into filing and payment compliance, and helped ensure that individuals understood their rights and responsibilities as U.S. taxpayers by conducting nearly 1,000 educational activities that were attended by over 143,000 individuals.<sup>1</sup>

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<sup>1</sup> See IRS Pub. 5066, Low Income Taxpayer Clinics 2022 Program Report (revised Jan. 2023) (forthcoming).



The success of the LITC Program is tied largely to the extensive use of volunteers. Some 1,200 volunteers contributed to the success of LITCs by volunteering over 46,000 hours of their time. More than 67 percent of the volunteers were attorneys, certified public accountants, or enrolled agents.<sup>2</sup>

There are many underserved low-income taxpayers across the nation who could benefit from LITC assistance, but IRC § 7526 contains restrictions that limit expansion of the LITC Program to assist additional taxpayers. First, the annual limitation on grants to a single clinic of \$100,000, which has remained unchanged since 1998, prevents the LITC Program Office from awarding additional funds to qualified clinics that have demonstrated excellence in assisting low-income and ESL taxpayers and the ability to efficiently handle more cases. Even if the restriction were to be retained, the \$100,000 cap enacted in 1998 would have to be raised to about \$182,000 simply to reflect the effects of inflation.<sup>3</sup> However, the LITC Program Office could ensure more taxpayers receive LITC services if it is given discretion to provide larger grants to clinics that demonstrate they can use funds productively, consistent with the objective of providing maximum geographic coverage to taxpayers across the United States. In 2019, Congress authorized an analogous program, the Volunteer Income Tax Assistance matching grant program, which provides free tax return preparation for individuals with low to moderate incomes (*i.e.*, below the maximum Earned Income Tax Credit threshold), individuals with disabilities, and individuals with limited English proficiency.<sup>4</sup> In doing so, it did not impose a per-program grant limitation. We recommend that the per-clinic limitation in the LITC statute be similarly removed.

Second, the 100 percent matching funds requirement may serve as a barrier to coverage. The purpose of the match requirement is to ensure that each clinic's management has a broad commitment to assisting taxpayers and solicits resources to further that objective. In general, strong clinics do not have difficulty meeting the requirement, and we believe the match requirement generally should be retained. In certain circumstances, however, resources to meet the match requirement may be limited, and taxpayers would be better served if the LITC Program Office is given the discretion to reduce it (but not below 25 percent). The LITC Program Office has encountered difficulty identifying and funding clinics in certain geographic areas, and a lower match requirement may make it economically feasible for other potential clinics to operate. If our recommendation to eliminate the \$100,000 per-clinic funding cap is adopted, clinics that can meet the 100 percent matching funds requirement when receiving grants of \$100,000 may have difficulty raising funds in excess of \$100,000 on a 1:1 basis. Thus, clinics awarded grants in excess of \$100,000 should not be held to the same 100 percent matching funds requirement. The same is true for new clinics that are trying to get off the ground in underserved areas. The LITC Program Office should be authorized to exercise limited discretion in setting an appropriate matching rate.

Third, the LITC statute, written in 1998, authorizes a funding level of up to \$6 million “[u]nless otherwise provided by specific appropriation.” In practice, the \$6 million authorization has not had an impact because the LITC Program is routinely funded by specific appropriation. The appropriation for the fiscal year ending September 30, 2022, is for \$13 million.<sup>5</sup> However, raising the authorized appropriation level would make an important statement of congressional support regarding the success of the LITC Program and the importance of providing representation, education, and advocacy for low-income and ESL taxpayers.

2 See IRS Pub. 5066, Low Income Taxpayer Clinics 2022 Program Report (revised Jan. 2023) (forthcoming).

3 See Bureau of Labor Statistics, CPI Inflation Calculator, [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm) (last visited Oct. 27, 2022).

4 See IRC § 7526A (generally modeled after the IRC § 7526 LITC statute).

5 Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, 136 Stat. 49, 244 (Mar. 15, 2022).

**RECOMMENDATIONS**

- Eliminate the \$100,000 per-clinic funding cap imposed under current law by removing subsection (2) from IRC § 7526(c) and renumbering subsequent subsections accordingly.
- Amend IRC § 7526(c)(5) to provide that the 100 percent “matching funds” requirement is the general rule but that the Secretary has the discretion to set a lesser matching rate (but not below 25 percent) where doing so would expand coverage to additional taxpayers.
- Raise the overall authorized LTC Program funding limitation from \$6 million to \$25 million in IRC § 7526(c)(1) and provide that the amount is to be increased annually by the percentage increase during the preceding calendar year in the Chained Consumer Price Index for All Urban Consumers (as published by the Bureau of Labor Statistics of the Department of Labor).

**Legislative Recommendation #64****Compensate Taxpayers for “No Change” National Research Program Audits****SUMMARY**

- *Problem:* To refine its audit selection formulas, the IRS audits a randomly selected group of taxpayers each year, effectively making them “guinea pigs” to help it improve the way it does its job. These “National Research Program” audits impose burden on the selected taxpayers, as they often incur fees for representation by a tax professional, they must devote considerable time to gathering and organizing requested documentation, and they experience the stress of an IRS audit.
- *Solution:* In the absence of fraud, compensate taxpayers who undergo National Research Program audits for audits that do not result in changes to their tax liabilities and consider waiving any tax, interest, and penalties that result from these audits.

**PRESENT LAW**

There is no provision under present law that authorizes compensation of taxpayers who are audited under the IRS’s National Research Program (NRP) or provides relief from the assessment of tax, interest, and penalties that may result from an NRP audit.

**REASONS FOR CHANGE**

Through the NRP, the IRS conducts audits of randomly selected taxpayers. The NRP benefits tax administration by gathering strategic information about taxpayer compliance behavior as well as information about the causes of reporting errors. This information helps the IRS update its workload selection formulas and thereby enables it to focus its audits on returns with relatively high likelihoods of error. It also helps the IRS to estimate the “tax gap.” In addition, NRP studies benefit Congress by providing taxpayer compliance information that is useful in formulating tax policies.

For the tens of thousands of individual taxpayers (or businesses) that are subject to NRP audits, however, they impose significant burdens. In essence, these taxpayers, even if fully compliant, serve as “guinea pigs” to help the IRS improve the way it does its job. They must contend with random and intensive audits that consume their time, drain resources (including representation fees), and may impose an emotional and reputational toll.

In 1995, the House Ways and Means Subcommittee on Oversight held a hearing on the NRP’s predecessor, the Taxpayer Compliance Measurement Program (TCMP).<sup>1</sup> Testimony provided during the hearing, and subsequent witness responses to questions-for-the-record, indicated that TCMP audits imposed a heavy burden on taxpayers and reflected a strong view that audited taxpayers were bearing the brunt of a research project intended to benefit the tax system as a whole. Proposals raised at the hearing included compensating taxpayers selected for TCMP audits as well as possibly waiving tax, interest, and penalties assessed during the audits.

Following the hearing, the House Budget Committee included a proposal in its 1995 budget reconciliation bill to compensate individual taxpayers by providing a tax credit of up to \$3,000 for TCMP-related expenses.<sup>2</sup> Ultimately, this proposal was not adopted. Instead, the IRS was pressured to stop conducting TCMP audits.

<sup>1</sup> *Taxpayer Compliance Measurement Program: Hearing Before the H. Subcomm. on Oversight of the H. Comm. on Ways and Means*, 104th Cong. (1995).

<sup>2</sup> See H.R. REP. NO. 104-280, vol. 2, at 28 (1995).

The inability to perform regular TCMP audits, however, undermined effective tax administration because it prevented the IRS from updating its audit formulas. Using older formulas likely meant that more compliant taxpayers faced (unproductive) audits and that audit revenue declined.

About a decade later, the IRS reinstated the TCMP under the new NRP name. Some procedures were changed, but the random selection of taxpayers and the burden on many of these taxpayers remained substantially unchanged. For the same reasons identified during the 1995 House hearing, the National Taxpayer Advocate believes it is appropriate to recognize that taxpayers audited under the NRP are bearing a heavy burden to help the IRS improve the effectiveness of its compliance activities. A tax credit or authorized payment would alleviate the monetary component of the burden. Further relief could be provided by waiving any assessment of tax, interest, and penalties resulting from an NRP audit. Such a waiver might also improve the accuracy of the NRP audits, as taxpayers might be more likely to be forthcoming with an auditor if they were assured they would not face additional assessments. However, this waiver should not apply where tax fraud or an intent to evade tax is uncovered in an NRP audit.

## RECOMMENDATIONS

- Amend the IRC to compensate taxpayers for no change NRP audits through a tax credit or other means.
- Consider waiving the assessment of tax, interest, and penalties resulting from an NRP audit, absent fraud or an intent to evade federal taxes.

**Legislative Recommendation #65****Establish the Position of IRS Historian Within the Internal Revenue Service to Record and Publish Its History****SUMMARY**

- *Problem:* Unlike many other federal agencies, the IRS does not have a historian to catalog and publish an analysis of its successes and failures. This is significant because many of the challenges the IRS faces are recurring, such as its decades-long efforts to modernize its information technology systems and its efforts to strike the appropriate balance between collecting delinquent taxes and respecting taxpayer rights. To cite an old adage, those who fail to learn from history are doomed to repeat their mistakes.
- *Solution:* Establish the position of IRS historian within the IRS to catalog and publish analyses of the agency's successes and failures.

**PRESENT LAW**

The IRS, as a federal agency, is required to properly maintain and manage its records under the Federal Records Act<sup>1</sup> and to provide public access to these records under the Freedom of Information Act.<sup>2</sup> However, the IRS is not required to publish a historical analysis of its tax administration programs and policies.

**REASONS FOR CHANGE**

The IRS's mission, priorities, and challenges have remained relatively constant over time. For example, the IRS's five-year strategic plan for fiscal years 2022-2026 sets out four goals:

- Provide quality and accessible services to enhance the taxpayer experience.
- Enforce the tax law fairly and efficiently to increase voluntary compliance and narrow the tax gap.
- Foster an inclusive, diverse and well-equipped workforce and strengthen relationships with our external partners.
- Transform IRS operations to become more resilient, agile and responsive to improve the taxpayer experience and narrow the tax gap.<sup>3</sup>

For the most part, these goals have been the same for several decades, and they are likely to remain the IRS's goals for the foreseeable future.<sup>4</sup> As IRS officials retire and are replaced and as leaders in the oversight community (including Congress, the Government Accountability Office, and the Treasury Inspector General for Tax Administration) retire and are replaced, these leaders would benefit enormously from an objective recording and assessment of prior IRS initiatives to achieve its strategic goals.

Numerous offices of history operate in the executive, judicial, and legislative branches.<sup>5</sup> Government historians serve various roles, such as researching and writing for publication and internal use, editing historical documents, preserving historical sites and artifacts, and providing historical information to the

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<sup>1</sup> 44 U.S.C. §§ 3101-3107.

<sup>2</sup> 5 U.S.C. § 552.

<sup>3</sup> IRS Pub. 3744, Strategic Plan FY 2022-2026 (July 2022).

<sup>4</sup> Some parts of the IRS's mission have evolved. Increasingly, the IRS has been called upon to administer social benefits programs (e.g., the Earned Income Tax Credit (EITC) and Child Tax Credits) and to administer financial relief payments (e.g., stimulus payments during the pandemic). In these areas, too, a thorough history would help policymakers pinpoint where additional resources should be targeted and how.

<sup>5</sup> *History at the Federal Government*, SOCIETY FOR HISTORY IN THE FED. GOV'T, <http://www.shfq.org/history-at-fedgov> (last visited Dec. 5, 2022).

public through websites and other media.<sup>6</sup> Historians should be objective and accurate.<sup>7</sup> For example, the Historian of the Department of State is required to publish a documentary history of the foreign policy decisions and actions of the United States, including facts providing support for, and alternative views to, policy positions ultimately adopted, without omitting or concealing defects in policy.<sup>8</sup> Historians in federal agencies promote transparency and accountability in this way. Because more U.S. citizens interact with the IRS than any other federal agency, the public interest and potential benefit in learning from the agency's successes and failures are particularly high.

During the early 1990s, the IRS decided to hire an IRS historian. However, the relationship was tense, and the individual who held the position told Congress that the IRS undermined her work and fought transparency, concluding that “the IRS shreds its paper trail, which means there is no history, no evidence, and ultimately no accountability.”<sup>9</sup> The IRS eliminated the position and never hired a historian again. The National Taxpayer Advocate believes the IRS should be required to have a historian to assist it in avoiding mistakes of the past and to promote transparency.

## RECOMMENDATION

- Add a new subsection to IRC § 7803 to establish the position of IRS historian within the IRS. The IRS historian should have expertise in federal taxation and archival methods, be appointed by the Secretary of the Treasury in consultation with the Archivist of the United States, and report to the Commissioner of Internal Revenue. The duties of the IRS historian require access to IRS records, including tax returns and return information (subject to the confidentiality and disclosure provisions of IRC § 6103). The IRS historian should be required to report IRS history objectively and accurately, without omitting or concealing defects in policy.<sup>10</sup>

6 SOC'Y FOR HISTORY IN THE FED. GOV'T, HISTORICAL PROGRAMS IN THE FEDERAL GOVERNMENT: A GUIDE (1992), <http://www.shfg.org/resources/Documents/Historical%20Programs.pdf>.

7 *Id.*

8 22 U.S.C. § 4351(a).

9 See *Practices & Procedures of the Internal Revenue Service: Hearings Before the S. Comm. on Finance*, 105th Cong. 35 (Sept. 23-25, 1997) (statement of Shelley Davis, former IRS Historian).

10 For additional background, see National Taxpayer Advocate 2011 Annual Report to Congress 582-586 (Legislative Recommendation: *Appoint an IRS Historian*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2011\\_ARC\\_Legislative-Recommendations.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2011_ARC_Legislative-Recommendations.pdf).

## APPENDIX 1: Additional Reference Materials for Legislative Recommendations in This Volume

LR #	Tax Administration Legislative Recommendations	National Taxpayer Advocate (NTA) Annual Report References	Congressional Bill and Committee Report References
<b>Strengthen Taxpayer Rights</b>			
1	Elevate the Importance of the Taxpayer Bill of Rights by Redesignating It as Section 1 of the Internal Revenue Code.	NTA 2017 Annual Report 93; NTA 2016 Annual Report 15, 98; NTA 2013 Annual Report 5, 51; NTA 2011 Annual Report 493; NTA 2007 Annual Report 478.	<a href="#">H.R. 7341</a> , 117th Cong. § 2 (2022).
<b>Improve the Filing Process</b>			
2	Treat Electronically Submitted Tax Payments and Documents as Timely If Submitted on or Before the Applicable Deadline.	NTA 2017 Annual Report 278.	<a href="#">H.R. 7844</a> , 117th Cong. § 4 (2022); <a href="#">H.R. 3278</a> , 117th Cong. § 1 (2021); <a href="#">H.R. 7641</a> , 116th Cong. § 1 (2020).
3	Authorize the IRS to Establish Minimum Competency Standards for Federal Tax Return Preparers.	NTA 2021 Annual Report 163; NTA 2009 Annual Report 41; NTA 2008 Annual Report 423.	<a href="#">H.R. 7341</a> , 117th Cong. § 2 (2022); <a href="#">S. 2856</a> , 117th Cong. § 1 (2021); <a href="#">H.R. 5375</a> , 117th Cong. § 1 (2021); <a href="#">H.R. 4184</a> , 117th Cong. § 2 (2021); <a href="#">H.R. 3737</a> , 117th Cong. § 2 (2021); <a href="#">H.R. 3738</a> , 117th Cong. § 401 (2021); <a href="#">S. 1192</a> , 116th Cong. § 2(c) (2019); <a href="#">S. 1138</a> , 116th Cong. § 5(c) (2019); <a href="#">H.R. 3157</a> , 116th Cong. § 5 (2019); <a href="#">H.R. 3330</a> , 116th Cong. § 2 (2019); <a href="#">H.R. 3466</a> , 116th Cong. § 1 (2019); <a href="#">H.R. 4751</a> , 116th Cong. § 2 (2019); <a href="#">S. 3278</a> , 115th Cong. § 202 (2018); <a href="#">H.R. 4912</a> , 114th Cong. § 401 (2016); <a href="#">S. 676</a> , 114th Cong. § 406 (2015); <a href="#">S. 2333</a> , 114th Cong. § 202 (2015); <a href="#">H.R. 4128</a> , 114th Cong. § 202 (2015); <a href="#">S. 137</a> , 114th Cong. § 2 (2015); <a href="#">H.R. 4141</a> , 114th Cong. § 2 (2015); <a href="#">H.R. 1528</a> , 108th Cong. § 141 (2004) (passed by Senate); <a href="#">S. 882</a> , 108th Cong. § 141 (2003) (reported by Sen. Fin. Comm.), <i>see also</i> <a href="#">S. REP. NO. 108-257</a> , at 30-31 (2003).



LR #	Tax Administration Legislative Recommendations	National Taxpayer Advocate (NTA) Annual Report References	Congressional Bill and Committee Report References
4	Extend the Time for Small Businesses to Make Subchapter S Elections.	NTA 2010 Annual Report 410; NTA 2004 Annual Report 390; NTA 2002 Annual Report 246.	<a href="#">S. 3278</a> , 115th Cong. § 304 (2018); <a href="#">S. 711</a> , 115th Cong. § 7 (2017); <a href="#">H.R. 1696</a> , 115th Cong. § 7 (2017); <a href="#">H.R. 1</a> , 113th Cong. § 3606 (2014); <a href="#">S. 2271</a> , 112th Cong. § 2 (2012); <a href="#">H.R. 3629</a> , 109th Cong. § 2 (2005); <a href="#">H.R. 3841</a> , 109th Cong. § 302 (2005).
5	Adjust Individual Estimated Tax Payment Deadlines to Occur Quarterly.	N/A	<a href="#">H.R. 4214</a> , 117th Cong. § 2 (2021); <a href="#">H.R. 5979</a> , 116th Cong. § 2 (2020); <a href="#">H.R. 593</a> , 116th Cong. § 2 (2019); <a href="#">S. 3278</a> , 115th Cong. § 305 (2018); <a href="#">H.R. 3717</a> , 115th Cong. § 2 (2017).
6	Eliminate Duplicative Reporting Requirements Imposed by the Bank Secrecy Act and the Foreign Account Tax Compliance Act.	NTA 2015 Annual Report 353.	<a href="#">H.R. 5799</a> , 117th Cong. §§ 2, 3 (2021); <a href="#">H.R. 4362</a> , 116th Cong. §§ 2, 3 (2019); <a href="#">S. 869</a> , 115th Cong. § 1 (2017) (pertaining to FATCA reporting requirements repeal); <a href="#">H.R. 2054</a> , 115th Cong. § 1 (2017) (same); <a href="#">H.R. 2136</a> , 115th Cong. § 1 (2017) (same); <a href="#">H.R. 5935</a> , 114th Cong. § 1 (2016) (same); <a href="#">S. 663</a> , 114th Cong. § 1 (2015) (same); <a href="#">S. 887</a> , 113th Cong. § 1 (2013) (same).
<b>Improve Assessment and Collection Procedures</b>			
7	Require That Math Error Notices Describe the Reason(s) for the Adjustment With Specificity, Inform Taxpayers They May Request Abatement Within 60 Days, and Be Mailed by Certified Mail.	NTA 2021 Annual Report 89; NTA 2018 Annual Report 174; NTA 2014 Annual Report 163; NTA 2011 Annual Report 74; NTA 2004 Annual Report 163; NTA 2003 Annual Report 113; NTA 2001 Annual Report 33.	N/A
8	Continue to Limit the IRS's Use of "Math Error Authority" to Clear-Cut Categories Specified by Statute.	NTA 2018 Annual Report 164, 174; NTA 2015 Annual Report 329; NTA 2014 Annual Report 163; NTA 2011 Annual Report 74.	N/A
9	Require Independent Managerial Review and Written Approval Before the IRS May Assert Multiyear Bans Barring Taxpayers From Receiving Certain Tax Credits and Clarify That the Tax Court Has Jurisdiction to Review the Assertion of Multiyear Bans.	NTA 2019 Annual Report vol. 2, at 239; NTA 2013 Annual Report 103.	N/A

LR #	Tax Administration Legislative Recommendations	National Taxpayer Advocate (NTA) Annual Report References	Congressional Bill and Committee Report References
10	Allow Additional Time for Taxpayers to Request Abatement of a Math Error Assessment Equal to the Additional Time Allowed to Respond to a Notice of Deficiency When the Math Error Notice Is Addressed to a Person Outside the United States.	NTA 2016 Annual Report 393.	N/A
11	Provide That Assessable Penalties Are Subject to Deficiency Procedures.	NTA 2021 Annual Report 179; NTA 2020 Annual Report 119.	N/A
12	Direct the IRS to Implement an Automated Formula to Identify Taxpayers at Risk of Economic Hardship.	NTA 2020 Annual Report 249.	N/A
13	Provide That “an Opportunity to Dispute” an Underlying Liability Means an Opportunity to Dispute Such Liability in the U.S. Tax Court.	NTA 2021 Annual Report 179; NTA 2018 Annual Report 367.	N/A
14	Prohibit Offset of the Earned Income Tax Credit Portion of a Tax Refund to Past-Due Federal Tax Liabilities.	NTA 2021 Annual Report 179; NTA 2016 Annual Report 325; NTA 2009 Annual Report 365.	N/A
15	Require the IRS to Waive User Fees for Taxpayers Who Enter Into Low-Cost Installment Agreements or Who Have an Adjusted Gross Income Equal to or Less Than 250 Percent of the Federal Poverty Level.	NTA 2021 Annual Report 179; NTA 2017 Annual Report 307; NTA 2015 Annual Report 14; NTA 2007 Annual Report 66.	<a href="#">S. 1793</a> , 115th Cong. § 301 (2017); <a href="#">S. 3471</a> , 114th Cong. § 504 (2016) (reported by Sen. Fin. Comm.) (low-income fee waiver provisions and limitation on future increase), <i>see also</i> <a href="#">S. REP. NO. 114-375</a> , at 84 (2016); <a href="#">S. 3156</a> , 114th Cong. § 114 (2016) (low-income fee waiver provisions and limitation on future increase), <i>see also</i> <a href="#">S. REP. NO. 114-298</a> , at 17-19 (2016); <a href="#">S. 1321</a> , 109th Cong. § 301 (2006); <a href="#">H.R. 1528</a> , 108th Cong. § 101 (2004) (passed by Senate); <a href="#">S. 882</a> , 108th Cong. § 101 (2003), <i>see also</i> <a href="#">S. REP. NO. 108-257</a> , at 5-6 (2003).
16	Improve Offer in Compromise Program Accessibility by Repealing the Partial Payment Requirement and Restructuring the User Fee.	NTA 2006 Annual Report 507.	<a href="#">H.R. 3738</a> , 117th Cong. § 206 (2021); <a href="#">S. 2689</a> , 115th Cong. § 17 (2018); <a href="#">H.R. 5444</a> , 115th Cong. § 11203 (2018) (low-income waiver); <a href="#">S. 3278</a> , 115th Cong. § 504 (2018) (low-income waiver); <a href="#">H.R. 2171</a> , 115th Cong. § 206 (2017); <a href="#">H.R. 4912</a> , 114th Cong. § 206 (2015).

LR #	Tax Administration Legislative Recommendations	National Taxpayer Advocate (NTA) Annual Report References	Congressional Bill and Committee Report References
17	Modify the Requirement That the Office of Chief Counsel Review Certain Offers in Compromise.	N/A	<a href="#">S. 1793</a> , 115th Cong. § 303 (2017); <a href="#">S. 1578</a> , 114th Cong. § 403 (2015); <a href="#">H.R. 1528</a> , 108th Cong. § 304 (2004) (passed by Senate); <a href="#">S. 882</a> , 108th Cong. § 104 (2003), <i>see also</i> <a href="#">S. REP. NO. 108-257</a> , at 8-9 (2003); <a href="#">H.R. 1528</a> , 108th Cong. § 304 (2003) (passed by House), <i>see also</i> <a href="#">H.R. REP. NO. 108-61</a> , at 43-44 (2003).
18	Require the IRS to Refund Any Payment Collected Pursuant to a Federal Tax Lien That Exceeds the Amount of an Accepted Offer in Compromise.	NTA 2006 Annual Report 507-519.	<a href="#">H.R. 2171</a> , 115th Cong. § 206 (2017); <a href="#">H.R. 4912</a> , 114th Cong. § 206 (2015).
19	Require the IRS to Release All Levies Upon Acceptance of an Offer in Compromise and Return to the Taxpayer Any Amount Collected Pursuant to the Levies in Excess of the Agreed Payment Amount.	N/A	N/A
20	Require the IRS to Mail Notices at Least Quarterly to Taxpayers With Delinquent Tax Liabilities.	N/A	<a href="#">H.R. 7844</a> , 117th Cong. § 2 (2022); <a href="#">S. 3278</a> , 115th Cong. § 201 (2018).
21	Clarify When the Two-Year Period for Requesting Return of Levy Proceeds Begins.	N/A	<a href="#">H.R. 7844</a> , 117th Cong. § 3 (2022).
22	Protect Retirement Funds From IRS Levies, Including So-Called "Voluntary" Levies, in the Absence of "Flagrant Conduct" by a Taxpayer.	NTA 2015 Annual Report 340; NTA 2006 Annual Report 527.	<a href="#">H.R. 3738</a> , 117th Cong. § 203 (2021); <a href="#">H.R. 2171</a> , 115th Cong. § 203 (2017); <a href="#">H.R. 3340</a> , 115th Cong. § 204 (2017); <a href="#">H.R. 4912</a> , 114th Cong. § 203 (2016); <a href="#">S. 2333</a> , 114th Cong. §§ 306, 307 (2015); <a href="#">H.R. 4128</a> , 114th Cong. §§ 306, 307 (2015).
23	Provide Taxpayer Protections Before the IRS Recommends the Filing of a Lien Foreclosure Suit on a Principal Residence.	NTA 2019 Annual Report 176; NTA 2012 Annual Report 537.	<a href="#">S. 949</a> , 114th Cong. § 16 (2015); <a href="#">H.R. 1828</a> , 114th Cong. § 16 (2015); <a href="#">S. 2215</a> , 113th Cong. § 8 (2014).
24	Provide Collection Due Process Rights to Third Parties Holding Legal Title to Property Subject to IRS Collection Actions.	NTA 2019 Annual Report 176; NTA 2012 Annual Report 544.	<a href="#">S. REP. NO. 105-174</a> , at 68 (1998) (Senate report accompanying its version of the RRA 98 legislation referred to "[t]he taxpayer (or affected third party)").
25	Extend the Time Limit for Taxpayers to Sue for Damages for Improper Collection Actions.	N/A	<a href="#">S. 1793</a> , 115th Cong. § 201(c) (2017) (extends the time limit, though not by the recommended amount); <a href="#">S. 1578</a> , 114th Cong. § 301(c) (2015) (same).

LR #	Tax Administration Legislative Recommendations	National Taxpayer Advocate (NTA) Annual Report References	Congressional Bill and Committee Report References
26	Revise the Private Debt Collection Rules to Eliminate the Taxpayers Intended to Be Excluded by the Taxpayer First Act.	N/A	N/A
<b>Reform Penalty and Interest Provisions</b>			
27	Convert the Estimated Tax Penalty Into an Interest Provision to Properly Reflect Its Substance.	NTA 2013 Annual Report vol. 2, at 1-13; NTA 2008 Annual Report vol. 2, at 34-36.	<a href="#">H.R. 1528</a> , 108th Cong. § 101 (2003) (passed by House), <i>see also</i> <a href="#">H.R. REP. NO. 108-61</a> , at 23-24 (2003).
28	Apply One Interest Rate Per Estimated Tax Underpayment Period.	N/A	<a href="#">S. 1793</a> , 115th Cong. § 305 (2017); <a href="#">S. 1578</a> , 114th Cong. § 405 (2015); <a href="#">H.R. 1528</a> , 108th Cong. § 101 (2003) (passed by House), <i>see also</i> <a href="#">H.R. REP. NO. 108-61</a> , at 25 (2003).
29	Pay Interest to Taxpayers on Excess Payments of Estimated Tax to the Same Extent Taxpayers Must Pay a Penalty on Underpayments of Estimated Tax.	N/A	N/A
30	Extend Reasonable Cause Defense for the Failure-to-File Penalty to Taxpayers Who Rely on Return Preparers to E-File Their Returns.	N/A	N/A
31	Authorize a Penalty for Tax Return Preparers Who Engage in Fraud or Misconduct by Altering a Taxpayer's Tax Return.	NTA 2011 Annual Report 558.	<a href="#">S. 2333</a> , 114th Cong. § 203 (2015); <a href="#">H.R. 4128</a> , 114th Cong. § 203 (2015).
32	Clarify That Supervisory Approval Is Required Under IRC § 6751(b) Before Proposing Penalties.	NTA 2019 Annual Report 157.	N/A
33	Require an Employee to Determine and a Supervisor to Approve All Negligence Penalties Under IRC § 6662(b)(1).	N/A	N/A
34	Modify the Definition of "Willful" for Purposes of Finding Report of Foreign Bank and Financial Accounts Violations and Reduce the Maximum Penalty Amounts.	NTA 2014 Annual Report 331-345.	N/A

LR #	Tax Administration Legislative Recommendations	National Taxpayer Advocate (NTA) Annual Report References	Congressional Bill and Committee Report References
<b>Strengthen Taxpayer Rights Before the Office of Appeals</b>			
35	Require Taxpayers' Consent Before Allowing IRS Counsel or Compliance Personnel to Participate in Appeals Conferences.	NTA 2019 Annual Report 62-68; NTA 2017 Annual Report 203.	<a href="#">S. 3278</a> , 115th Cong. § 601 (2018); <a href="#">S. 2689</a> , 115th Cong. § 7 (2018); <a href="#">S. 949</a> , 114th Cong. § 7 (2015) (bans <i>ex parte</i> communications between Appeals and other IRS employees on matters before Appeals); <a href="#">H.R. 1828</a> , 114th Cong. § 7 (2015) (same); <a href="#">S. 725</a> , 113th Cong. § 7 (2013) (same); <a href="#">H.R. 3479</a> , 113th Cong. § 7 (2013) (same); <a href="#">S. 2291</a> , 112th Cong. § 7 (2012) (same); <a href="#">H.R. 4375</a> , 112th Cong. § 7 (2012) (same).
<b>Strengthen the Office of the Taxpayer Advocate</b>			
36	Clarify That the National Taxpayer Advocate May Hire Legal Counsel to Enable Her to Advocate More Effectively for Taxpayers.	NTA 2016 Annual Report 37; NTA 2011 Annual Report 573; NTA 2002 Annual Report 198.	<a href="#">H.R. 1528</a> , 108th Cong. § 306 (2003) (passed by House), <i>see also</i> <a href="#">H.R. REP. NO. 108-61</a> , at 44-45 (2003); <a href="#">H.R. 1661</a> , 108th Cong. § 335 (2003).
37	Clarify the Authority of the National Taxpayer Advocate to Make Personnel Decisions to Protect the Independence of the Office of the Taxpayer Advocate.	N/A	N/A
38	Clarify the Taxpayer Advocate Service's Access to Files, Meetings, and Other Information.	NTA 2016 Annual Report 34.	<a href="#">H.R. 5444</a> , 115th Cong. § 11402(b) (3)(A) (2018) (providing "statistical support" for the Annual Report to Congress);- <a href="#">S. 2333</a> , 114th Cong. § 403 (2015) (addressing case-related file and meeting access); <a href="#">H.R. 4128</a> , 114th Cong. § 403 (2015) (addressing case-related file and meeting access).
39	Authorize the National Taxpayer Advocate to File <i>Amicus</i> Briefs.	NTA 2016 Annual Report 37; NTA 2011 Annual Report 573; NTA 2002 Annual Report 198.	N/A
40	Require the IRS to Address the National Taxpayer Advocate's Comments in Final Rules.	NTA 2016 Annual Report 37; NTA 2011 Annual Report 573.	<a href="#">S. 1578</a> , 114th Cong. § 404 (2015) (require the IRS to solicit NTA comments before publication rather than after).
41	Authorize the Office of the Taxpayer Advocate to Assist Certain Taxpayers During a Lapse in Appropriations.	NTA Fiscal Year 2020 Objectives Report 40-44; NTA Fiscal Year 2015 Objectives Report 79-91; NTA 2011 Annual Report 552.	<a href="#">S. 2333</a> , 114th Cong. § 404 (2015) (TAS may provide assistance to taxpayers facing enforcement actions during a lapse in appropriations); <a href="#">H.R. 4128</a> , 114th Cong. § 404 (2015) (same).

LR #	Tax Administration Legislative Recommendations	National Taxpayer Advocate (NTA) Annual Report References	Congressional Bill and Committee Report References
42	Repeal Statute Suspension Under IRC § 7811(d) for Taxpayers Seeking Assistance From the Taxpayer Advocate Service.	NTA 2015 Annual Report 316.	<a href="#">H.R. 3738</a> , 117th Cong. § 202 (2021); <a href="#">H.R. 2171</a> , 115th Cong. § 202 (2017); <a href="#">H.R. 4912</a> , 114th Cong. § 202 (2016).
<b>Strengthen Taxpayer Rights in Judicial Proceedings</b>			
43	Expand the Tax Court's Jurisdiction to Hear Refund Cases.	NTA 2018 Annual Report 364.	N/A
44	Authorize the Tax Court to Order Refunds or Credits in Collection Due Process Proceedings Where Liability Is at Issue.	NTA 2017 Annual Report 293.	N/A
45	Promote Consistency With the Supreme Court's <i>Boechler</i> Decision by Making the Time Limits for Bringing All Tax Litigation Subject to Equitable Judicial Doctrines.	NTA 2017 Annual Report 283.	N/A
46	Extend the Deadline for Taxpayers to Bring a Refund Suit When They Have Requested Appeals Reconsideration of a Notice of Claim Disallowance But the IRS Has Not Acted Timely to Decide Their Claims.	N/A	N/A
47	Authorize the Tax Court to Sign Subpoenas for the Production of Records Held by a Third Party Prior to a Scheduled Hearing.	N/A	N/A
48	Provide That the Scope of Judicial Review of "Innocent Spouse" Determinations Under IRC § 6015 Is <i>De Novo</i> .	NTA 2011 Annual Report 531.	<a href="#">H.R. 5444</a> , 115th Cong. § 11303 (2018); <a href="#">S. 3246</a> , 115th Cong. § 1003 (2018); <a href="#">H.R. 3340</a> , 115th Cong. § 202 (2017); <a href="#">S. 3156</a> , 114th Cong. § 113 (2016); <a href="#">H.R. 4128</a> , 114th Cong. § 303 (2015); <a href="#">S. 2333</a> , 114th Cong. § 303 (2015).
49	Clarify That Taxpayers May Raise Innocent Spouse Relief as a Defense in Collection, Bankruptcy, and Refund Cases.	NTA 2018 Annual Report 387; NTA 2010 Annual Report 377; NTA 2009 Annual Report 378; NTA 2007 Annual Report 549.	N/A
50	Fix the Donut Hole in the Tax Court's Jurisdiction to Determine Overpayments by Non-Filers With Filing Extensions.	NTA 2018 Annual Report 392.	N/A

LR #	Tax Administration Legislative Recommendations	National Taxpayer Advocate (NTA) Annual Report References	Congressional Bill and Committee Report References
<b>Miscellaneous Recommendations</b>			
51	Restructure the Earned Income Tax Credit (EITC) to Make It Simpler for Taxpayers and Reduce Improper Payments.	NTA 2021 Annual Report 163; NTA Fiscal Year 2020 Objectives Report vol. 3, at 8, 14, 17-19; NTA 2016 Annual Report 334.	<a href="#">H.R. 4665</a> , 117th Cong. § 2 (2021); <a href="#">H.R. 174</a> , 117th Cong. § 3 (2021); <a href="#">H.R. 2461</a> , 116th Cong. § 2 (2019).
52	Adopt a Consistent and More Modern Definition of “Qualifying Child” Throughout the Internal Revenue Code.	NTA 2018 Annual Report 421; NTA 2006 Annual Report 463.	N/A
53	Allow Taxpayers the Option of Using Prior Year Income to Claim the Earned Income Tax Credit (EITC) During Federally Declared Disasters.	N/A	<a href="#">S. 3542</a> , 116th Cong. (2020); <a href="#">H.R. 6762</a> , 116th Cong. (2020).
54	Exclude Taxpayers in Specified Circumstances From the Requirement to Provide a Social Security Number for Their Children to Claim the Child Tax Credit.	NTA Fiscal Year 2020 Objectives Report 48.	<a href="#">S. 1150</a> , 116th Cong. § 2 (2019) (credit allowed with respect to children who were born and died in the same tax year).
55	Clarify Whether Dependents Are Required to Have Taxpayer Identification Numbers for Purposes of the Credit for Other Dependents.	N/A	<a href="#">H.R. REP. NO. 115-466</a> , at 225-227 (Conf. Rep.) (2017).
56	Allow Members of Certain Religious Sects That Do Not Participate in Social Security and Medicare to Obtain Employment Tax Refunds.	N/A	<a href="#">H.R. 6183</a> , 117th Cong. § 2 (2021).
57	Amend the Lookback Period for Allowing Tax Credits or Refunds to Include the Period of Any Postponement or Additional or Disregarded Time for Timely Filing a Tax Return.	NTA 2018 Annual Report 392.	N/A
58	Modify the Requirement That Written Receipts Acknowledging Charitable Contributions Must Pre-Date the Filing of a Tax Return.	N/A	N/A
59	Make Standard Mileage Rates Consistent.	N/A	N/A
60	Eliminate the Marriage Penalty for Nonresident Aliens Who Otherwise Qualify for the Premium Tax Credit.	N/A	N/A
61	Encourage and Authorize Independent Contractors and Service Recipients to Enter Into Voluntary Withholding Agreements.	NTA 2016 Annual Report 322; NTA 2012 Annual Report 19; NTA 2010 Annual Report 371; NTA 2008 Annual Report 375.	<a href="#">H.R. 593</a> , 116th Cong. § 9 (2019); <a href="#">H.R. 1625</a> , 116th Cong. § 2(b) (2019); <a href="#">S. 700</a> , 116th Cong. § 2(b) (2019); <a href="#">H.R. 3717</a> , 115th Cong. § 9 (2017).



LR #	Tax Administration Legislative Recommendations	National Taxpayer Advocate (NTA) Annual Report References	Congressional Bill and Committee Report References
62	Require the IRS to Specify the Information Needed in Third-Party Contact Notices.	N/A	N/A
63	Expand the Protection of Taxpayer Rights by Strengthening the Low Income Taxpayer Clinic Program.	N/A	<a href="#">H.R. 3738</a> , 117th Cong. § 501 (2021).
64	Compensate Taxpayers for “No Change” National Research Program Audits.	N/A	<a href="#">S. 5014</a> , 117th Cong. §§ 1-3 (2022); <a href="#">S. 2689</a> , 115th Cong. § 14 (2018); <a href="#">H.R. REP. NO. 104-280</a> , vol. 2, at 28 (1995).
65	Establish the Position of IRS Historian Within the Internal Revenue Service to Record and Publish Its History.	NTA 2011 Annual Report 582.	N/A

## APPENDIX 2: Prior National Taxpayer Advocate Legislative Recommendations Enacted Into Law

LR #	Legislative Recommendations	Selected National Taxpayer Advocate (NTA) Report References	Public Laws Adopting the Recommendations (in Whole or in Part)
<b>Strengthen Taxpayer Rights and Taxpayer Service</b>			
1	Enact a Taxpayer Bill of Rights.	NTA 2014 Annual Report, Legislative Recommendation #1, 275-310; NTA 2013 Annual Report, Most Serious Problem #1, 1-5.	Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401, 129 Stat. 2242, 3117 (2015) (codified at IRC § 7803(a)(3)).
2	Require the IRS to Provide Annual Taxpayer Rights Training to Employees.	2017 Purple Book #2, 5-7.	Taxpayer First Act, Pub. L. No. 116-25, § 2402, 133 Stat. 981, 1014 (2019).
3	Improve Customer Service by Meeting the Preferences of Taxpayers and Stakeholders.	NTA 2008 Annual Report, Most Serious Problem #6, 95-113.	Pub. L. No. 116-25, § 1101(a), 133 Stat. 981, 985 (2019).
4	Revamp the IRS Budget Structure and Provide Sufficient Funding to Improve the Taxpayer Experience and Modernize the IRS's Information Technology Systems.	NTA 2021 Annual Report, 48, 62, 77, 106, 146; 2020 Purple Book #2, 3-6; NTA 2019 Annual Report, Most Serious Problem #1, 3-14; NTA 2019 Annual Report, Most Serious Problem #2, 15-22; NTA 2019 Annual Report, Most Serious Problem #3, 23-33.	An Act to Provide for Reconciliation Pursuant to Title II of S. Con. Res. 14 (commonly referred to as the "Inflation Reduction Act of 2022"), Pub. L. No. 117-169, 136 Stat. 1818 (2022).
<b>Improve the Filing Process</b>			
5	Authorize the Volunteer Income Tax Assistance Grant Program.	2019 Purple Book #3, 8-10; 2017 Purple Book #5, 12-13.	Pub. L. No. 116-25, § 1401(a), 133 Stat. 981, 993 (2019) (codified at IRC § 7526A).
6	Authorize the IRS to Work With Financial Institutions to Reverse Misdirected Deposits.	2019 Purple Book #9, 20-21; 2017 Purple Book #11, 24-25.	Pub. L. No. 116-25, § 1407, 133 Stat. 981, 1001 (2019) (codified at IRC § 6402(n)).
7	Provide Victims With Notice of Suspected Identity Theft.	NTA 2011 Annual Report, Most Serious Problem #3, 48-73.	Pub. L. No. 116-25, § 2007, 133 Stat. 981, 1005 (2019) (codified at IRC § 7529).
8	Give All Taxpayers the Option to Receive and Use an Identity Protection Personal Identification Number.	NTA 2017 Annual Report, Most Serious Problem #19, 211-218; NTA 2015 Annual Report, Most Serious Problem #16, 180-187.	Pub. L. No. 116-25, § 2005, 133 Stat. 981, 1004 (2019).
9	Provide Identity Theft Victims With a Single Point of Contact at the IRS.	NTA 2017 Annual Report, Most Serious Problem #19, 211-218; NTA 2015 Annual Report, Most Serious Problem #16, 180-187; NTA 2013 Annual Report, Most Serious Problem #6, 75-83; NTA 2011 Annual Report, Most Serious Problem #3, 48-73.	Pub. L. No. 116-25, § 2006, 133 Stat. 981, 1004 (2019).

LR #	Legislative Recommendations	Selected National Taxpayer Advocate (NTA) Report References	Public Laws Adopting the Recommendations (in Whole or in Part)
10	Develop and Implement Guidelines for Managing Stolen Identity Refund Fraud Cases.	NTA 2017 Annual Report, Most Serious Problem #19, 211-218; NTA 2015 Annual Report, Most Serious Problem #16, 180-187; NTA 2013 Annual Report, Most Serious Problem #6, 75-83; NTA 2011 Annual Report, Most Serious Problem #3, 48-73.	Pub. L. No. 116-25, § 2008, 133 Stat. 981, 1006 (2019).
11	Collaborate With the Public and Private Sectors to Protect Taxpayers From Identity Theft and Refund Fraud.	NTA 2017 Annual Report, Most Serious Problem #20, 219-226.	Pub. L. No. 116-25, § 2001, 133 Stat. 981, 1001 (2019).
12	Require Employers Filing More Than Five Forms W-2, 1099-MISC, and 941 to File them Electronically.	2019 Purple Book #8, 17-19; 2017 Purple Book #10, 21-23.	Pub. L. No. 116-25, § 2301, 133 Stat. 981, 1012 (2019) (codified at IRC § 6011(e)(2)(A)).
13	Increase Preparer Penalties.	NTA 2003 Annual Report, Key Legislative Recommendation, 270-301.	United States–Korea Free Trade Agreement Implementation Act, Pub. L. No. 112-41, Title V, § 501, 125 Stat. 428, 459 (2011) (codified at IRC § 6695(g)).
14	Allow Married Co-owners of a Business to Elect to File as Sole Proprietors Rather Than as Partners.	NTA 2002 Annual Report, Key Legislative Recommendation, 172-184.	U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Pub. L. No. 110-28, Title VIII, § 8215, 121 Stat. 112, 193 (2007) (codified at IRC § 761).
15	Tax a Child's Income at Rates That Do Not Depend on the Parents' (i.e., Fix the "Kiddie Tax").	NTA 2002 Annual Report, Key Legislative Recommendation, 231-242.	Pub. L. No. 115-97, § 11001, 131 Stat. 2054 (2017) (codified at IRC § 1).
16	Authorize the IRS to Require Brokers to Report Basis Information Upon the Sale of Securities.	NTA 2005 Annual Report, Key Legislative Recommendation #5, 433-441.	Energy Improvement and Extension Act of 2008, Pub. L. No. 110-343, Div. B, Title IV, § 403, 122 Stat. 3765, 3854 (2008) (codified at IRC § 6045(g)).
17	Accelerate the Filing Deadline for Certain Information Returns.	NTA 2013 Annual Report, vol. 2, 68-96.	Pub. L. No. 114-113, Division Q, Title II § 201, 129 Stat. 2242, 3076 (2015) (codified at IRC § 6071(c)).
18	Do Not Require Correction of <i>De Minimis</i> Errors on Certain Information Returns.	NTA 2013 Annual Report, vol. 2, 68-96.	Pub. L. No. 114-113, Division Q, Title II § 202, 129 Stat. 2242, 3076 (2015) (codified at IRC § 6721(c)).
19	Accelerate the Filing Deadline for Certain Partnerships and Trusts.	NTA 2003 Annual Report, Key Legislative Recommendation, 302-307.	Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, Pub. L. No. 114-41, § 2006(a), 129 Stat. 443, 457 (2015) (codified at IRC § 6072).

LR #	Legislative Recommendations	Selected National Taxpayer Advocate (NTA) Report References	Public Laws Adopting the Recommendations (in Whole or in Part)
20	Change the Deadline for Filing FinCEN Report 114 (Relating to Report of Foreign Bank and Financial Accounts) to Match the Deadline for Filing Federal Income Tax Returns and Form 8938 (Including Extensions).	NTA 2014 Annual Report, Legislative Recommendation #6, 331-333.	Pub. L. No. 114-41, § 2006(b)(11), 129 Stat. 443, 458-459 (2015).
21	Eliminate Tax Strategy Patents.	NTA 2007 Annual Report, Legislative Recommendation #4, 512-524.	Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 14(a), 125 Stat. 284, 327 (2011).
<b>Improve Assessment and Collection Procedures</b>			
22	Extend the Period for a Third Party to Request a Return of Levied Proceeds From Nine Months to Two Years.	NTA 2001 Annual Report, Key Legislative Recommendation, 202-208.	Pub. L. No. 115-97, § 11071, 131 Stat. 2054, 2091 (2017) (codified at IRC § 6343(b)).
23	Allow Taxpayers to Request Equitable Innocent Spouse Relief Under IRC § 6015(f) Any Time Before Expiration of the Period of Limitations on Collection.	2019 Purple Book #26, 48-49; 2017 Purple Book #16, 33.	Pub. L. No. 116-25, § 1203, 133 Stat. 981, 988 (2019) (codified at IRC § 6015(f)(2)).
24	Prevent the Debts of Low Income Taxpayers From Being Assigned to Private Collection Agencies.	2019 Purple Book #28, 52-53.	Pub. L. No. 116-25, § 1205, 133 Stat. 981, 989 (2019) (codified at IRC § 6306(d)(3)).
25	Hold Taxpayers Harmless When the IRS Returns Funds Levied From a Retirement Plan or Account.	2017 Purple Book #22, 41-42.	Bipartisan Budget Act of 2018, Pub. L. No. 115-123, Div. D, Title II, § 41104, 132 Stat. 64, 155-156 (2018) (codified at IRC § 6343(f)).
26	Authorize the IRS to Enter Into Partial Payment Installment Agreements That Do Not Fully Pay the Liability Before Expiration of the Limitations Period.	NTA 2001 Annual Report, Key Legislative Recommendation, 210-214.	American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 843, 118 Stat. 1418, 1600 (2004) (codified at IRC § 6159(a)).
27	Send Change of Address Notices to an Employer's Old and New Addresses and Promote the Use of Offers in Compromise for Victims of Payroll Tax Fraud.	NTA 2012 Annual Report, Most Serious Problem #23, 426-444.	Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, Division E, Title I, § 106, 128 Stat. 5 (2014) and subsequent appropriations acts.
<b>Reform Penalty and Interest Provisions</b>			
28	Clarify That a Reasonable Cause Exception Applies to the Penalty for Erroneous Refund or Credit Claims Under IRC § 6676.	NTA 2014 Annual Report, Legislative Recommendation #8, 351-356; NTA 2011 Annual Report, Legislative Recommendation #6, 544-547.	Pub. L. No. 114-113, Division Q, Title II, § 209(c), 129 Stat. 2242, 3085 (2015) (codified at IRC § 6676(a)).

LR #	Legislative Recommendations	Selected National Taxpayer Advocate (NTA) Report References	Public Laws Adopting the Recommendations (in Whole or in Part)
29	Notify Exempt Organizations When They Have Failed to File Two Consecutive Returns or Notices Before Their Exemption Is Automatically Revoked.	NTA 2011 Annual Report, Status Update #2, 437-450.	Pub. L. No. 116-25, § 3102, 133 Stat. 981, 1016 (2019) (codified at IRC § 6033(j)(1)).
30	Reduce the Disproportionate Penalty for Failure to Make Special Disclosures of "Listed Transactions" Under IRC § 6707A.	NTA 2008 Annual Report, Legislative Recommendation #10, 419-422.	Small Business Jobs Act of 2010, Pub. L. No. 111-240, § 2041, 124 Stat. 2504, 2560 (2010) (codified at IRC § 6707A(b)).
<b>Strengthen Taxpayer Rights Before the Office of Appeals</b>			
31	Codify the Independent Office of Appeals and Allow Those Denied Access to Appeals to Protest to the IRS Commissioner.	2019 Purple Book #35, 64.	Pub. L. No. 116-25, § 1001(a), 133 Stat. 981, 983 (2019) (codified at IRC § 7803(e)).
<b>Enhance Confidentiality and Disclosure Protections</b>			
32	Limit Redislosures and Unauthorized Uses of Tax Returns and Tax Return Information Obtained Through IRC § 6103-Based "Consent" Disclosures.	2019 Purple Book #38, 67; 2017 Purple Book #39, 66.	Pub. L. No. 116-25, § 2202, 133 Stat. 981, 1012 (2019) (codified at IRC § 6103(c)).
33	Penalize Unauthorized Disclosures of Return Information by Tax Whistleblowers.	NTA 2015 Annual Report, Legislative Recommendation #14, 413-418.	Pub. L. No. 116-25, § 1405(a)(2), 133 Stat. 981, 998 (2019) (codified at IRC § 7213(a)(2)).
34	Provide Status Updates Sufficient to Allow a Whistleblower to Monitor the Progress of the Claim.	NTA 2015 Annual Report, Most Serious Problem #13, 143-158.	Pub. L. No. 116-25, § 1405(a)(1), 133 Stat. 981, 997-998 (2019) (codified at IRC § 6103(k)(13)).
<b>Strengthen the Office of the Taxpayer Advocate</b>			
35	Codify the TAD Appeal Process and Require the NTA to Report to Congress on Any TAD Not Honored by the IRS.	2019 Purple Book #43, 75-76; 2017 Purple Book #41, 68-69; NTA 2016 Annual Report, Special Focus, 39-40.	Pub. L. No. 116-25, § 1301(a), 133 Stat. 981, 991-992 (2019) (codified at IRC § 7803(c)(5) and IRC § 7803(c)(2)(B)(ii)(VIII)).
36	Establish the Compensation of the NTA by Statute.	2019 Purple Book #49, 83-84; 2017 Purple Book #49, 79-80.	Pub. L. No. 116-25, § 1301(c), 133 Stat. 981, 993 (2019) (codified at IRC § 7803(c)(1)(B)(i)).

LR #	Legislative Recommendations	Selected National Taxpayer Advocate (NTA) Report References	Public Laws Adopting the Recommendations (in Whole or in Part)
<b>Strengthen Taxpayer Rights in Judicial Proceedings</b>			
37	Clarify That IRS Employees May Refer Taxpayers to a Specific Low Income Taxpayer Clinic.	2019 Purple Book #14, 29-30; 2017 Purple Book #8, 18; NTA 2007 Annual Report, Additional Legislative Recommendation #4, 551-553.	Pub. L. No. 116-25, § 1402, 133 Stat. 981, 997 (2019) (codified at IRC § 7526(c)(6)).
38	Consolidate Judicial Review of Collection Due Process (CDP) Hearings in the Tax Court.	NTA 2005 Annual Report, Key Legislative Recommendation #7, 447-470.	Pension Protection Act of 2006, Pub. L. No. 109-280, § 855, 120 Stat. 780, 1019 (2006) (codified at IRC § 6330(d)(1)).
39	Clarify That the Scope and Standard of Tax Court Determinations Under IRC § 6015(f) Is <i>De Novo</i> .	2019 Purple Book #52, 91-93; NTA 2011 Annual Report, Legislative Recommendation #4, 531-536.	Pub. L. No. 116-25, § 1203(a)(1), 133 Stat. 981, 988 (2019) (codified at IRC § 6015(e)(7)).
40	Clarify That the Tax Court Has Jurisdiction to Review Stand Alone Equitable Innocent Spouse Relief Determinations Under IRC § 6015(f).	NTA 2001 Annual Report, Key Legislative Recommendation, 159-165.	Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, Division C, Title IV, § 408, 120 Stat. 2922, 3061-3062 (2006) (codified at IRC § 6015(e)(1)).
41	Allow Taxpayers Seeking Exemption Under IRC § 501(c)(4) and Certain Others to Seek a Declaratory Judgment Just Like Those Seeking Exemption Under IRC § 501(c)(3).	NTA 2014 Annual Report, Legislative Recommendation #12, 371-379.	Pub. L. No. 114-113, Division Q, Title IV, § 406, 129 Stat. 2242, 3120 (2015) (codified at IRC § 7428(a)(1)).
42	Protect Tax Whistleblowers From Retaliation.	NTA 2015 Annual Report, Legislative Recommendation #13, 409-412.	Pub. L. No. 116-25, § 1405(b), 133 Stat. 981, 998-999 (2019) (codified at IRC § 7623(d)).
<b>Miscellaneous Provisions</b>			
43	Generally, Avoid Forfeiture or Seizure of Deposits Structured to Avoid Currency Reporting When They Are From a Legal Source.	IRS Reform: Perspectives From The National Taxpayer Advocate, Hearing Before the H. Comm. on Oversight, 115th Cong. (May 19, 2017) (statement of Nina E. Olson, National Taxpayer Advocate), 23.	Pub. L. No. 116-25, § 1201, 133 Stat. 981, 986-987 (2019) (codified at 31 USC § 5317(c)(2)).
44	Provide Commercial Fishermen the Benefit of Income Averaging Currently Available to Commercial Farmers.	NTA 2001 Annual Report, Additional Legislative Recommendation, 226.	Pub. L. No. 108-357, § 314(b), 118 Stat. 1418, 1468-1469 (2004) (codified at IRC § 1301(a)).
45	Allow Self-Employed Individuals a Deduction for Health Insurance Premiums.	NTA 2001 Annual Report, Additional Legislative Recommendation, 223.	Pub. L. No. 111-240, § 2042, 124 Stat. 2504, 2560 (2010) (codified at IRC § 162(l)).
46	Clarify That Attorney Fees for Discrimination Suits Are Deductible by Victims.	NTA 2002 Annual Report, Key Legislative Recommendation, 161-171.	Pub. L. No. 108-357, § 703, 118 Stat. 1418, 1546-1548 (2004) (codified at IRC § 62(a)(19) and then subsequently renumbered).

LR #	Legislative Recommendations	Selected National Taxpayer Advocate (NTA) Report References	Public Laws Adopting the Recommendations (in Whole or in Part)
47	Create a Uniform Definition of “Qualifying Child” for Tax Provisions Relating to Children and Family Status.	NTA 2001 Annual Report, Key Legislative Recommendation, 78-100.	Working Families Tax Relief Act of 2004, Pub. L. No. 108-311, § 201, 118 Stat. 1166, 1169-1175 (2004) (codified at IRC § 152).
48	Amend IRC §§ 108(a) and 6050P to Provide That Gross Income Does Not Include, and the Department of Education Is Not Required to Report, Income From the Cancellation of Student Loans Under the Coronavirus Aid, Relief and Economic Security Act.	2020 Purple Book, #59, 131-132.	American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9675, 135 Stat. 4, 185-186 (2021) (codified at IRC §108(f)(5).
49	Restructure the Earned Income Tax Credit to Make It Simpler for Taxpayers and Reduce Improper Payments.	NTA Fiscal Year 2020 Objectives Report, vol. 3, at 8, 14, 17-19; 2020 Purple Book, #53, 115-119.	Pub. L. No. 117-2, §§ 9621, 9622, and 9623, 135 Stat. 4, 152-154 (2021) (codified at IRC § 32).
50	Provide Earned Income Tax Credit Relief During National Disasters.	2021 Purple Book, #54, 120-121.	Pub. L. No. 117-2, § 9626, 135 Stat. 4, 157 (2021).





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